IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2006 Session

WILLIAM R. STEVENS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 98-A-625 Steve R. Dozier, Judge

No. M2005-00096-CCA-R3-PD - Filed December 29, 2006

The petitioner, William R. Stevens, appeals the judgment of the Davidson County Criminal Court denying his petition for post-conviction relief. He was convicted in 1999 of two counts of first degree premeditated murder and one count of especially aggravated robbery and sentenced to death for the murder convictions. His convictions and death sentence were affirmed by the Tennessee Supreme Court. See State v. Stevens, 78 S.W.3d 817, 823 (Tenn. 2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 873 (2003). On appeal, the petitioner presents a number of issues: (1) the petitioner was denied his right to due process and a fair hearing when the post-conviction court refused to reset the evidentiary hearing even though counsel had not had time to prepare; (2) trial and appellate counsel were ineffective; (3) the State committed prosecutorial misconduct during the petitioner's trial; (4) the trial court erred in refusing to sequester prospective jurors during the jury selection process; (5) the evidence is insufficient to support the convictions; (6) imposition of a death sentence violates the petitioner's constitutional rights; and (7) the rights of Dr. William Kenner were violated when he was not properly compensated for services rendered in this matter. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J.S. DANIEL, SR. J., joined.

Paul J. Morrow, Jr., Deputy Post-Conviction Defender, and Kelly A. Gleason, Assistant Post-Conviction Defender, for the appellant, William R. Stevens.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Thomas B. Thurman and Jon P. Seaborg, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner solicited his eighteen-year-old neighbor, Corey Milliken, to kill his wife, Sandra (Sandi) Stevens, and mother-in-law, Myrtle Wilson. In imposing the death penalty, the jury found two aggravating circumstances: prior violent felony and murder for hire. The proof, as set forth in our supreme court's decision on direct appeal, established the following:

Guilt Phase

> On December 22, 1997, police were dispatched to the [petitioner's] mobile home in Nashville in response to a 911 call made by the [petitioner] and eighteen year-old Corey Milliken. When the police arrived, they found the murdered bodies of forty-five year-old Sandra (Sandi) Jean Stevens, the [petitioner]'s wife, and seventy-five year-old Myrtle Wilson, the [petitioner]'s mother-in-law. After further investigation, the police concluded that Corey Milliken was hired by the [petitioner] to kill the women and to make the murders look like they were committed in furtherance of a burglary.
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> The record reveals that the [petitioner] and Milliken had known each other for approximately one year. Milliken and his then fifteen year-old brother, Shawn Austin, lived with their mother and step-father three trailers down from the [petitioner]. Both boys often worked for the [petitioner], assisting him in his job of putting underskirting on mobile homes. Austin testified at trial that his brother had a close relationship with the [petitioner] and that he and his brother spent a lot of their free time at the [petitioner]'s trailer.
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> Austin testified that in the fall of 1997, the [petitioner] approached both brothers and asked them if they would kill the [petitioner]'s ex-wife, Vickie Stevens. The [petitioner] instructed them to "get a rifle" and shoot her when she came out of her trailer. He told them that if she were dead, he would get full custody of his then nine year-old son, John. He would also get "her car, her trailer and her land."
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> However, around Thanksgiving, the [petitioner] changed his mind and offered to pay Milliken and Austin $2,500 apiece if they would instead kill his current wife, Sandi Stevens, and his mother-in-law, Myrtle Wilson. The [petitioner] and his wife were having marital problems, and he knew that another divorce would "wipe him out." He told the boys that he would get the money either from the proceeds of Ms. Wilson's life insurance policy or from the proceeds of a yard sale. Austin would act as a "lookout," while Milliken killed the victims in their trailer. The [petitioner] preferred that the victims be shot; however, if the boys could not find a gun with a silencer, Milliken was to kill them using a knife. Austin eventually decided that he

did not want to be the "lookout," but agreed to provide an alibi for the [petitioner]. He would not be paid for this participation, and therefore the entire $5,000 would be paid to Milliken.

Although the [petitioner] had not yet set a date for these murders, he took great pains in planning and instructing Milliken on exactly how the murders were to take place. For instance, he told Milliken to kill his mother-in-law first because his wife would not hear anything: she kept her door shut and the fan running in her bedroom. He also told Milliken that on the eve of the murders, the trailer would be unlocked, and the burglar alarm would not be set; as an extra precaution, Milliken would be given a key to the trailer.

The [petitioner] further instructed that after Milliken killed the victims, he was to steal certain items, including some of Mrs. Stevens's jewelry, and then "destroy" the trailer to make it look like a robbery had occurred. In fact, he took Milliken on a walk-through of the trailer, and he specified which items were to be stolen, which items were to be "trashed," and which items were to remain untouched, such as "the TV and the dishes and [his] Star Trek collection."

The [petitioner] also instructed Milliken on how he was to get rid of the evidence. For instance, Milliken was to take the stolen jewelry and put it in a bag. He would then throw the murder weapon on top of a nearby school building and throw the bag of stolen items into the river. Once all the evidence was disposed of, he would go to his girlfriend's house to establish an alibi.

According to the [petitioner]'s plan, on the morning of the murders, he and Austin would leave together to go to work. Milliken would commit the crimes while they were gone. The [petitioner] told Austin that if he was questioned by the police, he was to tell them that he saw Mrs. Stevens wave to them that morning as they left for work. The [petitioner] also told the brothers that if anybody got caught, "everybody was on their own." Furthermore, he instructed them not to take lie detector tests or "snitch on the other person."

Finally, a few days before December 22, 1997, the [petitioner] told the brothers that the murders needed to be committed on the twenty-second. He explained that his ex-wife was going to have back surgery at that time, and he would have his nine year-old son, John, staying with him. John would act as another alibi. Milliken agreed to commit the murders on that date.

At approximately 4:45 on the morning of Monday, December 22, Austin went over to the [petitioner]'s trailer where the [petitioner] and his young son were waiting for him. Milliken was still asleep because he had stayed up late the night before after having had an argument with his mother and step-father. Mrs. Stevens and Ms.

Wilson were also still asleep in their rooms and did not see the [petitioner] and the two boys leave for work.

The threesome drove approximately ninety miles to their jobsite at New Johnsonville, stopping for breakfast along the way. After they arrived, the [petitioner] decided that it was too muddy to work on the trailer, so they returned home, arriving back at the trailer park at around 8:30 a.m.

In a taped statement given on the day of his arrest, the [petitioner] said that when he walked up to the front door of his trailer, he observed that the door was ajar. When he stepped inside, he noticed that the Christmas tree was lying on its side and that "stuff was laying all over," and he "knew something was wrong." He looked towards his bedroom, saw his wife's leg "laying across the bed," and immediately assumed that both his wife and his mother-in-law were dead. The [petitioner] said that he never went into either bedroom to actually check on the women, nor did he ever see his mother-in-law's body. Instead, he just "ran out" with his son and Austin and went to Austin's trailer to call the police.

Officers Gary Clements and John Donnelly of the Metro Police Department were the first officers to arrive at the crime scene. After entering the trailer and finding the two bodies, the officers sealed off the crime scene and then began canvassing the area for witnesses and searching the grounds for physical evidence. Officer Clements soon met Corey Milliken in his trailer and started talking to him. During their conversation, he noticed blood spots on Milliken's t-shirt, blood under his nails, and fresh gouge marks on his cheek and wrist. Officer Clements eventually turned Milliken over to detectives for further questioning. Milliken confessed to committing the murders by himself and provided a detailed description of the murders and the crime scene.

Continuing his search for evidence, Officer Clements soon discovered that the underpinning on a nearby trailer had been pulled loose. When he looked under that trailer, he found a green canvas bag. The contents of the bag included the following: a white, blood-stained Miami Dolphins t-shirt; several pieces of jewelry; an eight-inch long butcher knife or kitchen knife; prescription medication lying loosely in the bag; a thirty-five millimeter camera; and a black camera bag.

Detectives Pat Postiglione and Al Gray, members of the Metro Police Department assigned to investigate the homicides, found no sign of forced entry. In fact, aside from the appearance of a struggle "in and about the bed area" in Ms. Wilson's room, the crime scene looked, for the most part, "staged." For instance, Detective Gray explained that dresser drawers were pulled open, but nothing in them appeared to be disturbed; clothes were taken out of the closet and dumped onto the floor while still on their hangers; and the Christmas presents were unwrapped, but

nothing appeared to have been stolen. Even the Christmas tree looked as if it were "gently pushed over," because none of the glass ornaments were broken or scattered on the floor, which would most likely have happened had there been a struggle. He also testified that certain rooms, which "looked like . . . very valuable area[s] of the trailer," remained undisturbed.

Both victims were found lying in their beds. Ms. Wilson was wearing a nightgown, which had been pulled above her waist. Her underwear was on the floor. There was a substantial amount of blood on her body, on the bed, and on several items in the room. Dr. Emily Ward, a pathologist with the Davidson County Medical Examiner's Office, performed autopsies on the victims. Her examination of Ms. Wilson revealed that she died from stab wounds and manual strangulation. Although her stab wounds were relatively superficial and did not pierce any vital organs, they resulted in a considerable amount of lost blood.

Mrs. Stevens was completely nude and left in a "displayed" position, that is, lying on her back with her legs spread apart. She died as a result of ligature strangulation. However, there was blood on her knees, indicating that the murderer had killed Ms. Wilson first and then transferred some blood onto Mrs. Stevens. There were also pornographic magazines placed around her body, as well as a photo album containing nude photos of the victim, presumably taken by the [petitioner] during their marriage. There was no evidence of blood on these items.

Dr. Ward's examination of Mrs. Stevens revealed a small, superficial tear in her vagina. Dr. Ward testified that she thought it was a post-mortem change in the skin, which likely occurred while the body was being moved for examination. Although she conceded on cross-examination that the decedent could have been sexually assaulted after death, she did not believe this to be the case because there was no bruising, swelling, or hemorrhaging around the tear.

The State introduced the testimony of Chris Holman, a friend of Milliken's, as additional evidence that the [petitioner] hired Milliken to commit these crimes. Mr. Holman testified that around the end of October, Milliken approached him and asked him if he knew where Milliken could get a gun with a silencer. Mr. Holman told him that he "wasn't into that anymore." Three weeks prior to the murder, Milliken approached Mr. Holman again and asked if he would help murder the [petitioner]'s wife and mother-in-law. He told Mr. Holman that they would go into the house and "make it look like it was a burglary," and that he would "split even" the $5,000 he was supposed to be paid. Mr. Holman refused.

Lane Locke, an inmate at the West Tennessee State Penitentiary, testified that he was the [petitioner]'s cellmate at the Davidson County Criminal Justice Center for approximately three weeks. During that time, the [petitioner], who knew that Locke

was formerly a police officer and a certified paralegal, discussed his case at great length because the [petitioner] wanted to benefit from Locke's "legal knowledge." The [petitioner] described his marital problems and told Locke that he did not want to go through another divorce because he had "his life in order and felt like . . . a divorce would wipe him out." The [petitioner] also discussed his relationship with Milliken, describing him as a "big, dumb kid" who was a source of conflict between him and his wife. Based on what the [petitioner] told him, Locke stated that it appeared that the [petitioner] "led Corey around quite a bit."

Locke also testified that the [petitioner] did not want to attend his wife's funeral and that he never showed any remorse or emotion over his wife's death. However, Locke testified that the [petitioner] was very upset when he returned from his preliminary hearing. He quoted the [petitioner] as saying, "Shawn [Austin] is just as guilty as the rest of us, and he's the only one that's gonna get away with it. I can't believe those idiots thought I was gonna pay them."

Michael Street, another inmate at the Criminal Justice Center, testified that the [petitioner] asked him if he would "intimidate Corey Milliken or have him killed in one form or fashion," because, as the [petitioner] said, "Corey was the only person that could put [him] in prison for the rest of [his] life." The [petitioner] told Street that he had hired another inmate to "try to do it," but the plan fell through. Street refused the [petitioner]'s request.

The State also introduced letters between the [petitioner] and Charles Randle, another inmate, in which the [petitioner] offered Randle money to harm or intimidate Milliken in jail. Evidence was introduced that the [petitioner] had obtained several hundred dollars in money orders made payable to Charles Randle.

The State also presented evidence indicating that the [petitioner] was taking money from his mother-in-law, Myrtle Wilson. Ms. Wilson's son, Larry Wilson, testified that for over three years before the murders were committed, he had been investing and otherwise monitoring her finances totaling $83,000. A month before she was killed, his mother expressed concern that she "didn't have the funds that she thought she should." Shortly after the murders, Mr. Wilson was examining his mother's financial information, and he discovered a check written on June 10, 1997, made payable to the [petitioner] for four thousand dollars. He explained that the check was questionable for several reasons: first, the check was printed rather than handwritten, and his mother never printed her checks; second, the printing was "way too clear" to be his mother's because she had grown "feeble" and her hand was "rather shaky" when she wrote; and finally, Ms. Wilson had recorded the amount for that check as *forty* dollars, not four thousand.

Additionally, Doris Trott, the victims' hairdresser since 1992, testified to

several conversations she had with Ms. Wilson early in the fall of 1997, during which Ms. Wilson complained that the [petitioner] never repaid her any of the money that he often borrowed. Later that fall, Ms. Wilson told Ms. Trott that the [petitioner] had asked her to sign a ten-thousand dollar life insurance policy, which she refused to do.

Evidence was also presented regarding the marital problems that the [petitioner] and Mrs. Stevens were having. In Mrs. Stevens's diary, she described her unhappiness in the marriage and her increasing distrust of her husband's fidelity. Although she still loved the [petitioner], she wanted to "get out" of the marriage. William Byers, Sandi Stevens's ex-husband, testified that he talked to her shortly before she died, and she told him that the [petitioner] explicitly refused to give her a divorce. She also expressed her dislike for Corey Milliken and described him as the source of many heated arguments between the [petitioner] and herself. She wrote that he was the "wedge" driving her and the [petitioner] apart.

The defense presented evidence of Corey Milliken's sexual infatuation with Sandi Stevens. Shawn Austin testified that his brother told him that the [petitioner] had shown him pictures of his wife in lingerie and in the nude, and that the [petitioner] told Milliken that she wanted to have sex with both of them at the same time.

The defense theory was that Milliken committed sexual murder as an act of aggression precipitated by an argument with his mother and step-father the night before the crimes. Milliken's step-father, Billy Stevens (unrelated to the [petitioner]), testified that he and Milliken did argue the night before the crimes, and that at one point he "grabbed" Milliken after Milliken "got smart with his mother." Milliken ran out of the house, but had returned home by the time Mr. Stevens left for work early the next morning. Mr. Stevens also testified that he and Milliken had argued in the past, and that on several occasions Milliken had run out of the house following an argument.

As evidence that these murders involved a sexual component, the defense introduced the testimony of crime scene expert, Gregg McCrary. Mr. McCrary testified that the display of pornographic magazines around Mrs. Stevens could "best be interpreted as an attempt to further humiliate or degrade" the victim, which "goes to the motive of a sex crime." He defined a sex crime as primarily a crime of violence in which the perpetrator uses sex to punish, humiliate, and degrade the victim.

. . . .

Penalty Phase

The State first presented evidence of the [petitioner]'s conviction in 1977 for second degree murder. The State also presented as victim impact evidence the testimonies of the victims' family members, who each discussed the devastating effect of the murders of Myrtle Wilson and Sandi Stevens on their lives.

In mitigation of the sentence, the defense presented testimony from the [petitioner]'s family members, co-workers, and neighbors. The [petitioner] was adopted into a family of five children. Chris Baumann, the [petitioner]'s sister, testified that the [petitioner] had a good childhood and was part of a "normal family." She also testified to the [petitioner]'s close relationship with his son, John. Robert Rasmus, the [petitioner]'s foster brother, also testified to the "great family upbringing" that all five children enjoyed. He further stated that the [petitioner] had done a wonderful job raising his son John, and that he was proud of how the [petitioner] had turned his life around after his first conviction in 1977. On cross-examination, Mr. Rasmus admitted that the [petitioner] had also been convicted of felony escape during his incarceration for second degree murder.

Vickie Stevens, the [petitioner]'s ex-wife, testified that the [petitioner] was a good husband and father during most of their marriage. After the divorce, he made all of his child support payments and remained a loving and supportive father. She also expressed her wish that the [petitioner] be spared the death penalty for the sake of their son.

Roger Cooper, the sales manager of a mobile home company, testified that he employed the [petitioner] in 1989 for approximately one year. During that time, he knew the [petitioner] to be a hard-working and dedicated employee, and he trusted the [petitioner] enough to give him a key to his own home.

Several of the [petitioner]'s neighbors testified to how helpful the [petitioner] was to others in the community. Specifically, the [petitioner] loaned money to his neighbors, checked in on neighbors who were elderly, sick, or alone, and voluntarily fixed their trailers without requiring payment.

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances for each of the two counts of murder: (1) the [petitioner] was previously convicted of the felony of second degree murder; and (2) the [petitioner] employed another to commit the murders of his wife and mother-in-law for the promise of remuneration. The jury was also instructed to consider all mitigating evidence, including the [petitioner]'s work history, the [petitioner]'s family history and close familial relationships, his positive role in the community, any other aspect of the [petitioner]'s background, character, or record, and any aspect of the

> circumstances of the offense favorable to the [petitioner] and supported by the evidence.
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> The jury found that the State had proven the two statutory aggravating circumstances beyond a reasonable doubt and that these two aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Consequently, on July 23, 1999, the [petitioner] was sentenced to death for each of the two murder convictions. . . .

Stevens, 78 S.W.3d at 823-29 (footnotes omitted).

Post-Conviction Hearing

At the August 30-31, 2004, post-conviction hearing, trial counsel testified that he had been practicing law for about eighteen years and had handled numerous felony trials, including first degree murder cases. He said he was appointed to represent the petitioner on or about May 6, 1998, and was qualified to represent clients charged with the death penalty; however, the petitioner's case was his first capital case. Trial counsel said he spent over 600 hours preparing for the petitioner's case and received funding to employ investigators to help prepare for both stages of the trial and submitted bills totaling approximately $55,000 for investigative services. He filed numerous pretrial motions and reviewed the police and prosecution files. Counsel also hired a jury consultant, crime scene expert, and mental health expert. He said he developed a "good relationship" with the petitioner and visited him in jail "at least once a week, probably most weeks, twice a week." The petitioner was "very adamant" about counsel's not presenting any mitigation evidence. Trial counsel said that an additional attorney was appointed after the State filed its notice of intent to seek the death penalty on July 13, 1998; however, another attorney was subsequently substituted as co-counsel on March 5, 1999. Trial counsel said he prepared for the guilt/innocence phase of the trial while co-counsel prepared for the mitigation phase.

Trial counsel said that their theory at the guilt-innocence phase was that Milliken was sexually enamored with the petitioner's wife, had a violent encounter with his mother and stepfather the night of the murders, and killed the victims. Counsel said his decision not to call Milliken to testify was a strategic one because he was afraid the jury would believe Milliken. Counsel said he tried to introduce Milliken's inconsistent statements to the police through the lead detective, but the State objected. At the sentencing phase, counsel's theory was "to ask the [j]ury for mercy" by introducing testimony of witnesses who "liked" the petitioner. The defense called twelve witnesses at the guilt phase and seven at the penalty phase.

Trial counsel testified that the jury selection process was lengthy and involved. He submitted questionnaires to each of the prospective jurors asking, among other things, about their views on the death penalty. Counsel said that he had no independent recollection of the jurors' answers during voir dire and that there were "a lot" of jurors he did not want on the case. The defense used all of the available peremptory challenges. Regarding Juror Jill Mersman who knew the petitioner's ex-

wife, Vickie Stevens, counsel said he did not challenge Mersman because "[t]heir relationship was more that they – she worked at a place where Ms. Stevens came in and left and they didn't know each other, they just knew each other. I think my metaphor, ships passing in the night, applies – describes what I thought their relationship was." Counsel said that he was satisfied that the juror's contact with Ms. Stevens was "so minimal as not to be a concern." Regarding the jurors who indicated on their questionnaires that they were in favor of the death penalty, trial counsel said, "I cannot believe that I wouldn't have asked for a challenge for cause. And being familiar with the process, I cannot believe that the Court didn't rehabilitate these [j]urors." Although Juror Robert Asbury was an attorney who favored the death penalty, trial counsel believed he would properly weigh and consider the facts. Trial counsel said he thought Asbury would be "a cantankerous juror" and not want "to agree with the other [j]urors, which is what [counsel] look[ed] for in a [j]uror." Counsel said the trial court questioned the petitioner about the decision regarding Juror Asbury in open court, and the petitioner agreed with it.

Trial counsel said that Shawn Austin and Sarah Suttle refused to meet with the defense team. He identified his March 9, 1999, letter to the district attorney general's office requesting copies of the audio interview of Suttle and Austin in exchange for not questioning them on cross-examination about their refusal to talk to the defense. He explained that he made this agreement with the State in order "to get the Jencks material early" and considered it to be "a fair trade-off, a good tactical decision." Asked his reason for not objecting to hearsay statements Milliken made to Austin, trial counsel responded, "I objected throughout the trial to what I thought was hearsay and was usually overruled. I believe in my mind that I kept getting overruled and quit making objections to try to obtain some credibility with the [j]ury. In my mind, if you're continuously overruled, . . . you lose credibility with the [j]ury." Asked if there was a reason not to ask for a limiting instruction about the hearsay, counsel said, "Not that I recall, there wouldn't be."

Trial counsel said he hired Dr. Leah Welch to conduct a full psychological evaluation of the petitioner. Dr. Welch's written report, as well as Dr. Schacht's[1] report and videotaped interview of the petitioner, were admitted into evidence. Counsel said the reports were discussed with the petitioner, and the petitioner did not want any mental health evidence introduced and acknowledged that in open court. Trial counsel said he did not call Dr. Welch to testify because the petitioner was diagnosed with Antisocial Personality Disorder. The petitioner never told the defense team that he had been sexually abused. Trial counsel said he did not want the jury to hear about the petitioner's prior conviction for second degree murder, the facts of which were that the petitioner shot, stabbed, and hit the victim in the head with a tire iron before setting his body on fire in a dumpster. Counsel also did not want the jury to learn that the petitioner had lied about his background or that he had a prior arson conviction for attempting to set a fire in the jail because there was no heat at the time.

Co-counsel testified that she graduated from law school in 1997 and that 75% of her caseload at the time of the petitioner's trial was criminal in nature. She was appointed in the petitioner's case on March 5, 1999, and his was her first capital case. She said that she was primarily responsible for

[1]Trial counsel testified that Dr. Schacht was hired by the State as rebuttal to Dr. Welch's report.

the sentencing phase and that she spent approximately 160 out-of-court hours and 73.5 in-court hours on the petitioner's case. Counsel said that the petitioner cooperated in the preparation for trial and that she did not "feel like he was hiding anything from us that could help the mitigation." She said the petitioner was concerned about the stress that testifying would cause his family. The petitioner never told her he had been sexually abused, and, to her knowledge, he never told Dr. Welch.

Co-counsel said that their main theory at the guilt-innocence phase was that "this was a sex crime and not a murder for hire crime. And then, of course, [the petitioner's] theory all along, from day one, was that he was not there and he did not do this." At the penalty phase, counsel attempted to "delve into the fact that [the petitioner] was a foster child, that there were problems tying in relationships with anybody." Co-counsel said they also tried to convince the jury that the petitioner's age should be a consideration for life imprisonment. She said that some of the petitioner's siblings, his ex-wife, and people who knew the petitioner's work ethic and character at the time of the crimes testified at the sentencing hearing.

Co-counsel said that she participated in the voir dire and that the decision about which jurors to strike and challenge for cause was a joint effort between her and trial counsel. She said the defense and the State submitted jury questionnaires to the trial court, and the trial court then submitted a court questionnaire to the jury.

Co-counsel said the defense team hired a mitigation specialist, Julie Hackenmiller, to investigate the petitioner's childhood background, medical records, mental health records, prior criminal records, and juvenile records. Co-counsel said that she reviewed all the information gathered by Hackenmiller and that the defense team had weekly and bi-weekly meetings to discuss the petitioner's case. The social history gathered by Hackenmiller revealed that the petitioner lived with his biological parents from birth to toddler age when he was placed in foster care. Co-counsel said that the defense had difficulty in obtaining the petitioner's records from Catholic Charities in Chicago, the foster care agency, and that some of the information in the records had been blacked-out, including the names of the petitioner's biological parents. According to the agency records, the petitioner experienced "spells and fainting" as a child, and his school records reflected that he had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and had disciplinary problems in school. Co-counsel recalled that the petitioner lived at a facility called Sky Ranch in South Dakota for about a year.

Co-counsel said that the social history compiled by Hackenmiller was provided to Dr. Welch prior to her evaluation of the petitioner. Counsel said she was aware that the petitioner's youngest son had been diagnosed with ADHD. Dr. Welch was retained by the defense to evaluate the petitioner's mental health "from the time of the crime until the time of trial." Dr. Welch administered a series of tests to the petitioner, conducted an extensive interview with him, and diagnosed him with Antisocial Personality Disorder. Co-counsel said she considered the diagnosis as a negative assessment of the petitioner "[t]o the ears of a [j]ury." After learning Dr. Welch's diagnosis, counsel decided not to have the petitioner evaluated by a psychiatrist.

Co-counsel said the decision regarding mental health mitigation was made by her, trial counsel, and Dr. Welch, and they feared the details of the petitioner's prior murder conviction would be brought out if they presented the mental health issues. She said she reviewed the reports from Drs. Welch and Schacht. She acknowledged that, according to the social history the defense obtained, the petitioner had lied about his background to the prison officials and said that the defense did not want the jury to hear about his untruthfulness. Counsel said she wanted to "humanize" the petitioner for the jury and, because he did not testify, she decided that calling his family members and others who knew him was a better approach than introducing records from his past.

Dr. William D. Kenner, a forensic psychiatrist, testified that he met with the petitioner twice in prison and reviewed numerous documents pertaining to the petitioner, including the reports from Drs. Welch and Schacht and his social history. Dr. Kenner said that the purpose of his evaluation of the petitioner was "to determine if at the time of the alleged crime, [the petitioner] suffered from a mental illness and whether those had a bearing on either issues of . . . guilt-innocence or mitigation." A review of the unredacted version of the Catholic Charities records showed that the petitioner was placed in an orphanage, shortly after he was born, as a result of his biological mother's neglect of his siblings. His siblings were placed in foster homes, and the petitioner remained at the orphanage for about three months before being placed in a series of foster homes. In October 1956, the petitioner was placed in the home of Clarence and Vernadine Rasmus where he "did well" as a young child. Dr. Kenner said the petitioner's ADHD caused him difficulty in school.

Dr. Kenner said that notations made by the petitioner's social workers showed that at age five, the petitioner was "a somewhat high-strung and nervous child and at times has difficulty accomplishing different tasks, because he's so excited." As a result of his problems in school, testing was conducted on the petitioner which revealed that he had an above-normal I.Q. but "barely adequate scores in his perceptional ability, spacial reasoning, number skills, visual motor coordination." Psychologists described the petitioner's behavioral development as "slower than average." Dr. Kenner said that the petitioner's stay in the orphanage provided him less than adequate kinesthetics stimulation and that children in orphanages develop at about two-thirds the rate of children who have normal environments. According to one report, the petitioner was "a rather nervous child, accustomed to having adults deal firmly with him. . . . And . . . in school, it's noted that he becomes so nervous and upset that he vomits." The petitioner's social adjustment was "very poor," and he often fought with other children his age. The petitioner also had ongoing orthopedic problems and had to wear special shoes for years.

Dr. Kenner said that notations made by the petitioner's social worker in 1963 indicated that the petitioner appeared to have a strong bond of affection toward his foster mother and needed reassurance of her love for him. Dr. Kenner attributed this need for reassurance to the petitioner's status in the home as a foster child, his early experiences in the orphanage, and the two failed foster homes in which he was initially placed. The social worker's annual summary for 1963 showed that the petitioner was impulsive and "aggressively sought adults' attention by misbehaving" which, according to Dr. Kenner, showed that the petitioner was "operating closer to a two year old level than seven year old level." Although the petitioner had adjustment problems in school, he did well

academically. Dr. Kenner said that the petitioner's foster mother was the strongest influence in controlling the petitioner's behavior. In the fourth grade, the petitioner's grades declined and he had more problems concentrating and paying attention. Dr. Kenner opined that the petitioner also had symptoms of Obsessive Compulsive Disorder. Dr. Kenner said the petitioner's foster parents never adopted him, partly because of his biological mother's interference.

Dr. Kenner said that the petitioner, at age ten, was removed from his foster home in Illinois and placed at Sky Ranch in South Dakota, a facility affiliated with the Catholic Church for children with significant behavioral issues. At Sky Ranch, the petitioner was anally raped and beaten with a belt by one of the priests. During the nine months he was at Sky Ranch, the petitioner was sexually assaulted a total of five times. The first person the petitioner disclosed the sexual abuse to was Kathryn Pryce, an investigator with the post-conviction defender's office, when she interviewed him in August 2003. As a result of the abuse at Sky Ranch, the petitioner began having dissociative episodes. When the petitioner returned to Illinois from Sky Ranch, he "remained a lonely boy . . . easily influenced by companions." In a 1969 annual report, the petitioner's case worker described him as "an immature thirteen and a half year old, who has a chronic problem with stealing and hoarding his loot in a collection in his basement" and concluded that his stealing problems reflected a sense of insecurity. The petitioner saw a psychiatrist, Dr. Robert Nodene, who diagnosed him as having "a schizoi[d] personality disorder of rather severe degree." Dr. Nodene placed the petitioner in group therapy with other teenagers which resulted in tremendous improvement in his attitude toward people as well as his schooling.

Dr. Kenner said that in high school the petitioner still had difficulty concentrating and his attention span was very short, but his relationship with his peers improved. When he was sixteen, the petitioner stole a woman's purse at a basketball game and received counseling as a result. The petitioner's foster parents threatened to remove him from the home if his behavior did not improve. According to a notation in the petitioner's records, the petitioner did not feel that he was being accepted by his foster family. The petitioner was prescribed Ritalin "for a time" to help his concentration but had to discontinue it because of adverse side effects. The petitioner's behavior began to improve until 1972 when he was placed on probation for intent to commit burglary which was the result of his attempt to retrieve his special orthopedic shoes that someone had thrown onto the school's rooftop.

Dr. Kenner testified that by 1974, the petitioner's "life had finally come together both academically and socially." The petitioner's records reflected that he appeared "to have an adequate degree of self-awareness for a seventeen year old male" and was "able to enjoy normal peer relationships." After the petitioner graduated from high school, he joined the armed forces. Dr. Kenner acknowledged that the petitioner passed all of the physical and mental tests required to enter the military and that he was honorably discharged. The petitioner later married his high school sweetheart, and they had one son before divorcing in the mid-1970s. The petitioner married his second wife in 1985 and they also had a son. According to Dr. Kenner, the petitioner "was dependent on the women in his life."

Dr. Kenner said that he reviewed the records from Middle Tennessee Health Institute where the petitioner was sent for evaluation for his prior murder case and that the petitioner had lied about his background when he was interviewed by the mental health professionals there. The petitioner did not want his foster family involved in that trial. Dr. Kenner also reviewed Sandi Stevens' medical records which showed that she was taking Prozac, Soma, Prednisone, testosterone, and methadone at the time of her death. According to Dr. Kenner, the combination of Mrs. Stevens' medications and the menopausal symptoms she was experiencing affected her behavior and state of mind in the months leading up to her death.

Asked to explain the petitioner's "unemotional" demeanor in front of the detectives after the murder of his wife, Dr. Kenner explained that his demeanor could be attributed to the previous losses he had suffered in life and his experiences at Sky Ranch. Dr. Kenner opined that the detectives misinterpreted the petitioner's emotional defenses "in that he emotionally withdrew from the intensely painful experience of – as – that he was cold about his wife's murder." Dr. Kenner also said that the petitioner would not display any emotion to other inmates if he could avoid it. Dr. Kenner said he reviewed the petitioner's letters to his ex-wife, Vickie, and their son, John, which were written about a week after the death of Sandi Stevens while the petitioner was in solitary confinement. Dr. Kenner explained that writing these letters was the petitioner's "only way of reaching out and having some human contact." He further explained that this was not unusual for someone with the petitioner's dependency needs.

Dr. Kenner said that he did not agree with Drs. Welch and Schacht's diagnoses of Antisocial Personality Disorder, explaining that the petitioner's difficulties "came instead from his ADHD and . . . the anxiety fueled by his early losses." Dr. Kenner said that the petitioner's improvements in behavior after receiving the appropriate treatment as an adolescent tended to negate the diagnosis of Antisocial Personality Disorder. Dr. Kenner explained that one of the criteria for Antisocial Personality Disorder is "consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or on financial obligations." He said that, according to the reports, the petitioner was a good worker and paid child support for his son, John. Another inconsistency with the diagnosis of Antisocial Personality Disorder was the length of time between the petitioner's release from prison for the second degree murder and his arrest in this case in which he functioned fairly well and did not get into trouble. However, Dr. Kenner acknowledged on cross-examination that after the petitioner's release from prison for the prior murder conviction, he had been arrested twice, been unfaithful to his wife, "cheated" on his taxes, and "jumped from job to job to job." Dr. Kenner said the diagnosis for Antisocial Personality Disorder changed in 1996 and acknowledged that if the earlier criteria were used, "you could fit [the petitioner] into that category, if you ignored the other issues that would have given rise to that behavior. If you used the one that was current at the time of his trial, then you wouldn't."

Dr. Kenner opined that Dr. Welch's work in the petitioner's case "fell short," explaining that Dr. Welch was "fresh out of school, had limited experience. I don't think she's ever done a death penalty case. She did not . . . review very carefully the developmental history on [the petitioner]. So I think she, in her approach, missed some critical issues." As to Dr. Schacht, Dr. Kenner said,

"I think he was primarily grading [Dr. Welch's] papers, as well." Dr. Kenner acknowledged that Dr. Welch's interview with the petitioner lasted thirteen hours and Dr. Schacht's lasted five hours.

Dr. Kenner said he also had reviewed Corey Milliken's videotaped statements to the police and his social services records. Dr. Kenner said that the theory that Milliken committed the murders as part of a sexual fantasy was "consistent with his behavior on the [video]tape" where he could be seen masturbating while talking about the victim, Sandi Stevens.

Dr. Kenner said he administered a mental status examination to the petitioner during which the petitioner was oriented and had no delusions or hallucinations. The petitioner described men in his past in "very sarcastic terms" which indicated that he had "a chip on his shoulder when it comes to men." The petitioner also described dissociative episodes which he was still experiencing. The petitioner related that the social workers he had as a child often threatened to remove him from his foster home if he did not behave appropriately which undermined his relationship with his foster parents and future mental health professionals. The petitioner described "his painful experiences with his corrective shoes that left him stigmatized as being different." The petitioner told Dr. Kenner that his experience at Sky Ranch had "sealed his status as a foster child in his mind." Dr. Kenner said the petitioner had "after-effects of the sexual abuse, that he felt like he needed to keep his distance from men, particularly physical distance." Dr. Kenner diagnosed the petitioner with ADHD, Dissociate Disorder and Dependent Personality Disorder with obsessive compulsive features, meaning that the petitioner was unusually dependent on others because of the early losses in his life.

On cross-examination, Dr. Kenner testified that he was hired to evaluate the petitioner in late 2003 or early 2004 but did not interview him until June 30, 2004, two days after the court deadline for expert reports. He explained that he had wanted to interview Milliken first and that it took him several months to review and "write up" the petitioner's foster care records. His second interview with the petitioner was on August 13, 2004, the day after the court denied a continuance. He acknowledged that he did not review the petitioner's trial transcripts but said he reviewed the summaries prepared by the post-conviction defender's office.

Dr. Kenner acknowledged that the petitioner, in his prior murder trial, lied to the jury about his background and had lied to mental health professionals in the past. Dr. Kenner agreed that the facts of the petitioner's prior murder conviction could have impacted the jury's decision on the death penalty. Dr. Kenner said that the petitioner's history of malingering with mental health professionals was partly "an attempt to control the interview and to stay away from what's really painful for him." Dr. Kenner said it was not unusual that the petitioner did not disclose the sexual abuse until he was confronted about it by Ms. Pryce and acknowledged that the petitioner never disclosed the abuse to Dr. Schacht even though Dr. Schacht specifically asked him about that type of abuse.

Ross Alderman, the Davidson County Public Defender, testified that he represented the codefendant, Corey Milliken. He said that Milliken was available to testify at the petitioner's trial and that his testimony would have implicated the petitioner, consistent with his second statement to the police. However, Milliken was not called to testify. On cross-examination, Alderman

acknowledged that Milliken gave a different version of the killings, which was inconsistent with both his first and second statements to the police, at his post-conviction hearing.

Julie Hackenmiller, a mitigation specialist with Inquisitor, Incorporated, testified that she was hired by the defense team in August 1998 to investigate the petitioner's background. She said she was unable to obtain the unedited records from Catholic Charities. She said trial counsel did not seem interested in mitigation because the petitioner told counsel he preferred the death penalty if convicted; however, co-counsel appeared to be interested in working on the mitigation. According to a memorandum Hackenmiller wrote to counsel on June 30, 1999, less than two weeks prior to trial, co-counsel was not going to obtain the unredacted Catholic Charities records even though counsel mentioned she had the opportunity to do so. Counsel requested Hackenmiller not to pursue the identity or location of the petitioner's biological family. Counsel also informed her that they "planned to keep all mental health issues out of trial and mitigation, including [the petitioner's] long history of counseling since a young age." According to Hackenmiller, co-counsel "believed it would be difficult to explain and convince the [j]ury that mitigation is not an excuse or justification for the [petitioner's] actions." Hackenmiller explained that the mitigation themes she suggested that counsel use were: the petitioner was placed in an orphanage as a baby and did not know his biological family; he lived in a foster home where his ability to stay in the home was contingent upon his behavior and he did not receive unconditional love; he was sent away for behavioral problems at age nine for one year and was not allowed to visit home during that period; he was required to wear orthopedic shoes for over ten years as a child which caused teasing by his peers; he was sent to mental health counseling beginning at age six; he was diagnosed with ADHD at a time when the diagnosis was rare and was prescribed Ritalin for at least six years; he was diagnosed as having a schizoid personality disorder where he was void of emotional bond with others, partly due to his foster parents' refusal to totally commit to him; he made "an excellent transition back into society after his incarceration"; he had an excellent employment record; he was helpful and kind to neighbors; he had a son whom he loved; he had been examined by physicians for epileptic seizures, neurological disorders, hypoglycemia, and fainting spells; and his biological father was incarcerated in a maximum security facility in Illinois. She acknowledged that the petitioner never told her he had been sexually abused.

Kathryn Pryce, a legal clerk and investigator for the post-conviction defender's office, testified that she made inquiries into the petitioner's stay at Sky Ranch and that through her research she discovered a newspaper article and a court case dealing with sexual abuse at Sky Ranch. She met with the petitioner several times to review his social history and then met with him on August 21, 2003, at which time the petitioner disclosed the sexual abuse to her. She acknowledged that the petitioner did not tell her about the sexual abuse until after she had informed him that she had documentation about the abuse that occurred at Sky Ranch. She said the petitioner did not want to testify about his alleged abuse.

At the conclusion of the testimony, defense counsel introduced a written offer of proof of additional evidence that would have been presented had the post-conviction court granted his motion to continue the hearing. The offer contained the information gathered by Pryce and a list of

witnesses and facts about which they would have allegedly testified. Included in the witness list were a fellow inmate of the petitioner, two fellow inmates of one of the State's witnesses from trial, and the petitioner's foster mother and biological mother. Information about Milliken's social history was included in the offer as well. Defense counsel did not inform the trial court when the information in the offer was obtained.

The post-conviction court subsequently entered a lengthy and detailed order on December 14, 2004, denying the petition for post-conviction relief.

ANALYSIS

I. Denial of Continuance of Evidentiary Hearing

The petitioner argues that he was denied his right to due process and a full and fair hearing "when counsel were forced to proceed to hearing without having read the entire file, fully investigating grounds for relief, or adequately preparing for the hearing."

The petitioner filed his petition for post-conviction relief, with the assistance of the Office of the Post-Conviction Defender, on February 25, 2003. On March 4, 2003, the post-conviction court appointed the Post-Conviction Defender to represent the petitioner, ordered counsel to file any amended petition within thirty days, and scheduled a hearing date for July 1, 2003. According to statements by counsel, the Office of the Post-Conviction Defender assigned this case to Attorneys Paul J. Morrow, Jr. and Jon J. Tucci. On March 19, 2003, counsel filed a motion for an extension of time to file an amended petition. The court granted counsel until August 29, 2003, to file the amended petition and set a new hearing date for November 3, 2003. Counsel filed a motion on August 26, 2003, for a second extension of time in which to amend the *pro se* petition. The requested extension to prepare an adequate amended petition was necessary, according to counsel, because of counsel's caseload, the nature of the case, the volume of the original trial record, the trial court's denial of funding for support services, recent health problems experienced by Attorney Tucci, and a recent death in the investigator's family. The post-conviction court granted this request as well, giving counsel until October 30, 2003, in which to file the amendment. After conferring with both parties, the court subsequently set a new hearing date of February 17-19, 2004.

Counsel filed the amended petition on October 30, 2003. Although the petitioner raised many different issues, the petition focused primarily on the ineffective assistance of counsel. The State filed its response to the petition on December 1, 2003. On January 9, 2004, the petitioner filed a motion to continue the hearing date. Counsel stated in the motion that additional time was needed to further investigate and to consult with recently funded expert witnesses. The court granted petitioner's motion and continued the hearing date until May 3, 2004. On March 12, 2004, the petitioner filed another motion to continue. In support of the motion, counsel stated that the investigator involved in this case was scheduled to appear in another post-conviction capital case previously set for hearing on May 10, 2004, and that counsel had a previously planned vacation. The court again granted the petitioner's request and continued the hearing until August 30, 2004.

On August 4, 2004, the petitioner filed another motion to continue the evidentiary hearing, setting out the following reasons for the request:

> 1) the sudden departure of lead counsel Jon Tucci; 2) the loss of one-third of Post-Conviction Defender legal staff since the beginning of this year; 3) the need for reasonable time to allow newly hired counsel Kelly Gleason, who has been assigned to this case, to engage in adequate preparation for a hearing in this death penalty case; 4) the combination of end of fiscal year funding problems, the surgeries of the sole investigator assigned to this case, and recent discovery of an erroneous line of investigation by trial attorneys which has now led to discovery of the petitioner's true biological family; and 5) undersigned counsel's briefing and hearing schedule over which he has little or no control.

According to Attorney Morrow's motion, Attorney Tucci "bor[e] the brunt of the work in this case - including client contact, working with the mental health expert, and coordinating the investigation." Tucci offered his letter of resignation from the Office of the Post-Conviction Defender on May 19, 2004, and his last day of employment was May 31, 2004. Attorney Kelly Gleason replaced Tucci on August 2, 2004.

The post-conviction court conducted a hearing on the petitioner's motion to continue, at which Attorney Tucci was subpoenaed to appear. However, citing his ethical duty to his former client, Tucci refused to answer specific questions the judge asked about the nature and extent of his involvement in this case. Although the reason for Tucci's departure was never clearly revealed, it appears he had some disagreement with other staff members in an unrelated matter. Attorney Morrow told the court that he had participated in a post-conviction hearing in a separate capital case in February 2004 and had been involved in two hearings in the previous year to determine whether his clients were mentally retarded. Morrow also indicated that he had two post-conviction hearings scheduled in Shelby County in September, but he could not advise the court whether those hearings were set prior to, or after, he was granted his previous motion for continuance in this case. Asked why counsel waited over two months after learning that Tucci was leaving to file their latest motion or inform the court, Attorneys Morrow and Donald Dawson, the Post-Conviction Defender, were uncertain. Although Morrow stated he would not want the court to order/appoint Tucci to continue representing the petitioner, Tucci indicated he was willing to provide Morrow with the information he had.

The post-conviction court issued an eight-page order denying the motion to continue. After recounting the procedural history and the statements of counsel, the court detailed why it was denying the motion:

> Having reviewed the motion and having heard from counsel, the Court is unpersuaded by any of the arguments of petitioner's counsel. First, although Mr. Tucci's departure from the PCDO [Post-Conviction Defender's Office] in May 2004 is a primary basis for a continuance of the hearing, no one from the PCDO notified

this Court of the departure or of a need for relief from the present deadlines. When asked by the Court, counsel could offer no explanation for such a delay. Mr. Dawson expressed his belief that the Court should have been notified earlier. Nothing from the explanation given by Mr. Tucci or the PCDO justifies a continuance of this matter.

Second, this matter has been rescheduled on a number of occasions as set out herein. In many of those motions for a continuance, counsel affirmatively states that no further continuances will be necessary. While the Court is mindful that on occasion unexpected events do occur that warrant a last-minute continuance, this is not one of those occasions.

Third, the scheduling in other matters is addressed by the Court each time a new hearing date is selected. The Court inquires into the parties' schedule and attempts to schedule a mutually agreeable date for a hearing. Each time the hearing is rescheduled a week of the Court's schedule is designated solely for this matter. This Court recognizes the importance of these matters and the necessity of bringing numerous schedules together. However, if counsel scheduled this hearing with the knowledge of two September hearings in Memphis or in the alternative if counsel scheduled the Memphis hearings with knowledge of this hearing, counsel did so at its peril. Counsel's statement to the Court that he "took a crash course" to prepare for a scheduled hearing in a Knoxville case perhaps is telling of his recognition of the urgency of deadlines. Although counsel indicates that the Knoxville matter was continued, he nonetheless recognized the need to prepare for the hearing deadline.

Counsel also referenced the "new information" discovered by his office. According to the motion, it appears that the investigator located the petitioner's biological family. Therefore, they need additional time to further investigate the biological family. When asked by the Court, counsel conceded that he had already located the family but needed to follow up with interviews and records requests.

Viewing this case in its entirety, in light of the procedural history and in light of the continuance motion now before the Court, the Court cannot conclude that a fifth continuance is warranted in this case. The Court must balance the [petitioner's] right to a full and fair hearing with the rights of the state, the statutory mandates, and the victim's rights amendment. Because the Court has granted the petitioner's motions to continue on at least four prior occasions since the appointment of the PCDO over sixteen (16) months ago, the scales have thus far been tipped in favor of the [petitioner]. He has had more than sufficient time to prepare for a full and fair hearing. Accordingly, this fifth motion for a continuance is denied.

At the conclusion of the hearing, counsel asked permission for an interlocutory appeal, which was denied, and thereafter asked permission to withdraw, which was also denied.

On August 19, 2004, counsel filed a renewed motion for a continuance, again mentioning the resignation of Attorney Tucci and the need for additional time to allow Attorney Gleason to familiarize herself with the case as reasons in support of the request. Counsel further stated that additional time was needed to further investigate new leads. Attorney Morrow also described his caseload and general lawyering duties. In both the previous motion and the renewed motion, counsel asserted that the lack of a full staff in their office hindered their ability to effectively and fully pursue their representation in this and other cases in which they had been appointed. On August 25, 2004, the post-conviction court denied in a written order the renewed motion, observing that counsel offered no new argument, except for their extensive quoting of the American Bar Association Guidelines. The petitioner subsequently filed an application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 10, which was denied by this court on August 26, 2004. William R. Stevens v. State, No. M2004-02050-CCA-R10-PD, Davidson County (Tenn. Crim. App. Aug. 26, 2004), perm. to appeal denied (Tenn. Aug. 27, 2004). This court concluded that the post-conviction court did not so far depart from the accepted and usual course of judicial proceedings as to require immediate review.

Prior to the commencement of the hearing on August 30, 2004, counsel orally renewed their motion to continue in open court. The court again denied the request for a continuance.

The petitioner argues on appeal that the post-conviction court abused its discretion in denying his request for a continuance of the August 30, 2004, hearing date. He contends that the court denied him a full and fair hearing on his petition by forcing him to proceed with the hearing after Attorney Tucci quit his position with the Office of the Post-Conviction Defender but before Attorneys Morrow and Gleason could adequately prepare for the hearing. The petitioner alleges that, despite Morrow's acknowledgment that he was assigned co-counsel to this case upon the appointment of the Office of the Post-Conviction Defender in March 2003, Tucci was in charge of the case. According to the petitioner's argument, when Tucci left the office in May 2004, the Post-Conviction Defender's Office was ill-prepared to go forward with the scheduled hearing almost three months later.

The decision whether to grant a continuance rests within the sound discretion of the trial court. State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995). The denial of a continuance will not be disturbed on appeal unless it appears the trial court abused its discretion resulting in prejudice to an appellant, namely that the failure "denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." Id.

In assessing this claim, we briefly will review the procedural history of this matter. Counsel were appointed to represent the petitioner in March 2003. The original hearing date of July 1, 2003, which the post-conviction court recognized was unrealistic, was continued four times upon the petitioner's requests. Attorney Morrow filed a motion on March 12, 2004, to continue the hearing date of May 3, 2004. The only reasons offered in support of the motion were a previously scheduled vacation by Attorney Morrow and a conflict in the schedule of the investigator assigned to this case.

Presumably then, counsel were otherwise prepared to go forward with the hearing on May 3, 2004. As for the final continuance, the trial court continued the matter until August 30, 2004.

While Attorney Gleason stated she could not be prepared for the hearing within one month of having been hired by the Post-Conviction Defender's Office, Attorney Morrow never specifically explained to the post-conviction court why he was not prepared after having been assigned to the case for well over a year and a half. Morrow acknowledged he was assigned to the case as soon as the Office of the Post-Conviction Defender was appointed, and his name appears on all motions and pleadings filed in the post-conviction court. As noted above, Morrow was presumably ready for the hearing in May were it not for his previously planned vacation. Moreover, during the hearing on August 12, 2004, Morrow advised the court he was not interested in having the court appoint Tucci to continue his representation of the petitioner, despite the fact that Tucci informed the court he was willing to cooperate with Morrow and provide him with whatever information he possessed.

Attorney Tucci resigned three months before the scheduled hearing. As the post-conviction court stated, before setting any hearing date, the court conferred with counsel for both parties to ensure there would be no conflict with their schedules. Attorney Morrow offered no reasonable explanation why three months was an insufficient amount of time to review any work performed by Tucci, especially given the fact that he was already involved in the matter for over a year.

At the hearing, the petitioner presented to the court an offer of proof he would have introduced had he been granted a further continuance. It consisted of information available to trial counsel or in existence at the time of trial, which the petitioner argues should have been investigated and revealed to the jury, and of witnesses whom the petitioner claims he did not have time to depose or call to testify at the post-conviction hearing. Counsel did not state when they obtained the information which comprised the offer of proof.

Although counsel never specified how much additional time would be needed, Attorney Morrow stated before the hearing on August 30, 2004, that "the kind of continuance we were asking for, I think, was only a matter of months for Ms. Gleason to get up to speed." In fact, Morrow had "a matter of months" after Tucci resigned. The bulk of counsel's argument in their brief before this court focuses on their duties relating to representation of their client. Counsel cites to numerous rules and guidelines governing every attorney's professional responsibilities but devotes little time addressing actual prejudice to this case. Morrow was counsel of record in this case beginning in March 2003. There is no explanation as to why he did not have sufficient time within the three months between Tucci's departure and the hearing date, or prior to May 2004 for that matter, to discuss the case with Tucci. Tucci agreed to convey any information regarding his knowledge of the case; however, Morrow specifically informed the court he was not interested in having Tucci continue representation. Indeed, there is nothing in the record to show that any aspect of the case was prejudiced by Tucci's departure. Accordingly, we conclude that the record does not reflect that the post-conviction court abused its discretion in denying another continuance of the evidentiary hearing.

II. Ineffective Assistance of Counsel

The petitioner claims that counsel were ineffective in a number of areas, both at trial and during the appeal.

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was ineffective. The standard is grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

We note that when post-conviction proceedings have included a full evidentiary hearing, as was true in this case, the court's findings of fact and conclusions of law are given the effect and weight of a jury verdict, and this court is "bound by the trial judge's findings of fact unless we conclude that the evidence contained in the record preponderates against the judgment entered in the cause." Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). As explained in State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999), "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See Burns, 6 S.W.3d at 461.

On appeal, the petitioner argues that requiring him to prove both prongs of the Strickland test by clear and convincing evidence "violates clearly established United States Supreme Court precedent." We respectfully disagree with the petitioner's interpretation of Sepulveda v. State, 90 S.W.3d 633 (Tenn. 2002), as well as his view of the ruling of the post-conviction court in this matter. In fact, that court simply applied the holding of Strickland and concluded that the petitioner failed to prove his claims by clear and convincing evidence. This claim is without merit.

Additionally, the petitioner argues that this court "must disregard the conclusions of the post-conviction court and review all factual finding[s] and legal conclusions *de novo*." He contends that the standards applied by the supreme court in Sepulveda, for a petitioner to prove ineffective assistance of counsel in a post-conviction petition, and Fields v. State, 40 S.W.3d 450 (Tenn. 2001),

for an appellate court to review a post-conviction court's findings of facts and conclusions of law, are erroneous. However, this court is bound by the decisions of our supreme court, and we must adhere to the standard of review set out in Fields. This claim is without merit.

Guilt Phase

A. Jury Selection

The petitioner argues that his trial attorneys failed to conduct an adequate voir dire and to challenge certain jurors for cause, especially as to "death qualification." Specifically, he argues that trial counsel should have exercised a peremptory challenge or challenged for cause Juror Robert Asbury and that the trial court should have excused him "on its own motion." He also argues that trial counsel were ineffective in similar fashions as to Jurors Jill Mersman, Edward Marks, John Doezema, Robert Woods, Kenneth Sterling, and Pamela Roberts.

In denying relief as to this part of the ineffective assistance of counsel claim, the post-conviction court concluded that the petitioner was second-guessing decisions of trial counsel:

> Petitioner elicited testimony from counsel regarding the issue and referenced specific jurors by name. Though counsel could not recall specifics about some of the jurors, [trial counsel] said he recalled the voir dire process. He remembered using all of his peremptory challenges to strike jurors he, [co-counsel] and petitioner collectively thought should be stricken, noting that petitioner took an active role in jury selection. When asked why he did not move for more challenges for cause, [trial counsel] responded that he understood the law and the process of rehabilitation. As to each juror, he chose not to challenge for cause if they were sufficiently rehabilitated in his mind.
>
> [Trial counsel] also explained that the jury selection process was a "numbers game." The process necessarily required him to select those jurors counsel and petitioner believed would be best suited to hear the case.
>
> At this post-conviction level, petitioner attempts to attack various answers given by certain jurors. He claims these select answers, some given during individual voir dire and others given as responses in jury questionnaires, support exclusion of those jurors. In hindsight an attorney's performance can always be second guessed. Further, hindsight permits an analysis of these select answers given by a prospective juror during the selection process.
>
> The Court recognizes that jury selection is a "process." While jurors give answers in jury questionnaires which would seem to indicate they believe one way or the other about the death penalty[,] their responses in open court differ greatly. Counsel said he took all of the answers as a whole, consulted with co-counsel and

> petitioner and used all of his peremptory challenges to strike those jurors deemed most detrimental to their case.
>
> This Court concludes that counsel's performance did not fall below the acceptable standard enumerated in Strickland and Baxter v. Rose. This claim is without merit.

We will review the petitioner's claims as to these jurors.

Juror Robert Asbury, an attorney with a solo practice in Nashville at the time of the trial, said, during voir dire, that serving on the jury would be a financial imposition but would not preclude his paying attention to the trial. He ranked himself an eight on a scale of ten in favor of the death penalty but said he would listen to all of the evidence and consider all possible punishments. After he was empaneled as a juror, Asbury wrote a letter to the trial judge, saying that his practice would suffer during his service and that he was "shocked" defense counsel would choose to keep someone with his "pro-prosecution and pro-death penalty background." He asked the court to excuse him from the jury. The trial court thereafter conducted a hearing concerning the request, at which Asbury testified that he wrote the letter because of his concern that information of a pending civil lawsuit against his wife might end up in the press if it were learned he was serving on this jury. Asbury said that if his name was not released publicly, he "certainly . . . could be fair and impartial." At no time during the court's questioning did Asbury mention his view of capital punishment, and trial counsel stated he did not have any objection to Asbury remaining on the jury. Additionally, the court asked the petitioner if he had any reservations about Asbury sitting on the jury, and the petitioner, likewise, stated he did not. The trial court then concluded that Asbury could remain on the jury. The record supports the finding of the post-conviction court that the petitioner failed to show trial counsel were ineffective in not exercising a peremptory challenge or challenging for cause Juror Asbury.

As to the petitioner's additional claim that the trial court erred in not excusing Asbury on its own motion, he failed to establish any basis for the court's doing so. His claims in this regard are not supported by Asbury's responses during jury selection. Similarly, the petitioner contends appellate counsel was ineffective for not raising the issue on appeal. The claim would have been baseless at trial, as well as on appeal.

The petitioner argues that counsel should have challenged Juror Jill Mersman because she "could never consider a sentence of less than death under the circumstances of [the] case," and she knew the petitioner's ex-wife, Vickie Stevens. However, the record does not support the petitioner's view of the responses made by this juror. As for the petitioner's claim that Juror Mersman said that she would consider only a sentence of death for the facts presented to her in the case on trial, we respectfully disagree that she so testified. As for the claim she should have been excused from the jury because she "knew" the petitioner's ex-wife, testimony showed that she encountered Vickie Stevens only in passing at her workplace. Trial counsel testified that he was satisfied that Juror Mersman's contact with Ms. Stevens was so minimal as not to be of concern. The record supports

the finding of the post-conviction court that trial counsel were not ineffective in not exercising a peremptory challenge or challenging for cause Juror Mersman.

The petitioner argues that trial counsel also should have challenged Jurors Edward Marks, John Doezema, Robert Woods, Kenneth Sterling, and Pamela Roberts because of their opinions as to various aspects of the imposition of capital punishment. However, the petitioner's arguments in this regard rely upon his characterizations of the responses given by these jurors. The record supports the determination by the post-conviction court that the petitioner failed to show that trial counsel were ineffective in their decisions as to these jurors.

Without elaboration, the petitioner makes the general claim that trial counsel failed to conduct an adequate voir dire on the meaning of mitigation and pretrial publicity. However, he fails to explain in what aspects the voir dire questions were insufficient or how he was prejudiced by counsel' s alleged inadequacies. Likewise, he offers no argument in support of his claims that the State's argument to the jury about the burden of proof for mitigation was erroneous or that the trial court's instruction suggested that the death penalty was "mandatory in certain cases." These claims are without merit.

B. Errors as to Witnesses Corey Milliken and Gregg McCrary

1. Codefendant Corey Milliken

The defense theory at trial was that Corey Milliken acted alone. The petitioner contends counsel were ineffective by not calling Milliken to testify, so that he could be impeached with his inconsistent statements to the police.

The post-conviction court found that trial counsel had made a "strategic decision" in deciding not to call Milliken as a witness:

> At the post-conviction hearing, counsel testified he considered the effect of Milliken's testimony in light of the inconsistent statements given by Milliken. While counsel acknowledged a potential benefit from a portion of Milliken's testimony, he also faced the likely possibility that Milliken might testify consistently with the statement which directly implicated petitioner in the murders. This anticipated occurrence was confirmed by the testimony of Ross Alderman, the co-defendant's attorney. Trial counsel said he had to make the strategic decision not to call [Milliken] as a witness. Based on this decision, determining the witness'[s] availability was unnecessary.

We will review the petitioner's claims. Milliken gave two statements to the police, saying in the first that he acted alone in the killings. However, in his second statement, he said that he was hired by the petitioner to kill the two victims. Neither statement was introduced into evidence at trial. By the petitioner's view, if Milliken had been called to testify and invoked his Fifth

Amendment right against self-incrimination, the trial court would have declared him an unavailable witness under Tennessee Rule of Evidence 804(a) and allowed his statements to be introduced.

At the evidentiary hearing, trial counsel explained that he made the strategic choice not to call Milliken because he did not want the jury to hear him directly implicate the petitioner. Milliken's attorney testified that, had his client been called to testify at the trial, he would not have invoked his Fifth Amendment right against self-incrimination but would have testified, consistent with his second statement, that he had been hired by the petitioner to kill the two victims. While the petitioner has a theory as to how trial counsel might have successfully countered Milliken's testimony that the petitioner had hired him for the killings, it is sheer speculation that this strategy would have been successful. Further, the petitioner's theory as to how evidence of Milliken's troubled past, as recounted by Dr. Kenner during the evidentiary hearing, would have countered any adverse effects of his testimony implicating the petitioner again relies upon the speculation that this testimony would have had the anticipated effect on the jury. The record supports the determination of the post-conviction court that the petitioner failed to show that trial counsel were ineffective in their decision not to call Milliken as a witness.

Additionally, the petitioner argues that, had trial counsel called Milliken as a witness, he could have been impeached with his first statement to the police. However, as explained in Neil P. Cohen et al., Tennessee Law of Evidence, § 6.13[2][d] (5th ed. 2005), "a witness may not be impeached primarily for the purpose of introducing a prior inconsistent statement." See State v. Jones, 15 S.W.3d 880 (Tenn. Crim. App. 1999).

Even if the petitioner were correct that, by calling Milliken as a witness, trial counsel could have impeached him with his first statement, the fact remains that Milliken then would have been subject to cross-examination by the State and, according to his attorney, would have testified that his second statement, implicating the petitioner, was the truthful one. The post-conviction court found that trial counsel were not ineffective by not calling Milliken to testify, and, as we have said, the record supports this determination.

2. Expert Witness Gregg McCrary

The petitioner argues that trial counsel were ineffective in the handling of their expert witness, Gregg McCrary, who had been retained to testify about the behavior and motivation of the perpetrator of the crimes. The defense intended his testimony to support their theory that Milliken killed the victims for sexually motivated reasons. The trial court permitted McCrary to testify as a crime scene expert, and the court's limits on his testimony were affirmed on appeal. Stevens, 78 S.W.3d at 829-36. The post-conviction court found that this claim was without merit:

> [P]etitioner challenges counsel's failure to adequately prepare the expert obtained by trial counsel. Specifically noting the purported testimony of former F.B.I. Agent Gregg McCrary, petitioner blamed counsel for the Court's exclusion of his testimony. It is often that counsel brings an expert before the Court in an attempt to present

> testimony on a various issue. In this case, trial counsel called McCrary for a specific purpose. McCrary testified to the Court about the nature and extent of his testimony. That the Court . . . eventually excluded the testimony on evidentiary grounds does not equate to ineffective assistance of counsel. This claim is without merit.

At the trial, McCrary testified that the crime scene in this case resembled a "disorganized sexual homicide scene." Id. at 830. The petitioner argues that trial counsel "put all their eggs in one basket by using Mr. McCrary to present proof that Milliken acted alone and had a sexual motivation for the killings." Similarly, the petitioner argues that counsel failed to make an appropriate pretrial motion to determine the admissibility of McCrary's testimony. As we understand, the petitioner argues that either an expert other than McCrary should have been utilized or trial counsel should have obtained a pretrial ruling and been better prepared during the hearing on the admission of McCrary's expert opinion. As the State observes, the petitioner did not offer any additional proof at the evidentiary hearing that he believed counsel should have presented at the trial.[2] The jury learned through other testimony that Milliken was sexually infatuated with one of the victims. McCrary's testimony, in fact, supported the defense theory that this was a sexually motivated crime. Counsel's decision to call McCrary was strategic, and the petitioner has failed to show how this decision fell below the objective standard of reasonableness. Moreover, the petitioner has failed to demonstrate how the trial court's ruling regarding the acceptance of McCrary as an expert on criminal behavior would have been different had counsel requested a pretrial hearing on the matter or presented additional authorities when the matter was heard during the trial. As previously noted, the supreme court reviewed this matter on direct appeal and determined the type of testimony intended for McCrary to be inadmissible. These claims are without merit.

C. Testimony of Sarah Suttle and Shawn Austin

The petitioner contends that counsel were ineffective when they "incomprehensibly entered into a bargain" to obtain before trial the statements of Sarah Suttle and Shawn Austin. According to the petitioner, trial counsel's agreement not to question these two witnesses at trial about their refusal to talk to the defense in exchange for statements to which they were otherwise entitled negatively impacted the defense of the case.

Trial counsel testified that the parents of Suttle and Austin refused to allow them to talk to the defense, and counsel knew the State was planning to call both as witnesses at the trial. Because trial counsel believed they could be important witnesses, he made an agreement with the State that he would not ask them about their refusal to speak to defense counsel prior to trial. Although the petitioner argues to the contrary, he did not establish that he was prejudiced by this agreement.

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[2] In his reply brief, the petitioner argues that had trial counsel pursued a pretrial hearing as to McCrary and obtained a ruling by the trial court, counsel "then [would have] become aware of the vulnerabilities of relying so heavily on [McCrary's] testimony and, accordingly, developed an alternative strategy." At the hearing, however, the petitioner did not present proof showing what an effective "alternative strategy" might have been.

Similarly, the petitioner contends that trial counsel were ineffective in not objecting to the hearsay testimony of Suttle and Austin, both of whom testified at length at the trial. He has not identified any of the statements of Austin or Suttle which he believes was inadmissible hearsay. Although trial counsel did not raise a hearsay objection to this testimony, the petitioner speculates that "[a]lthough difficult to cull from the record, presumably, the exception used by the Court in the case *sub judice* could be the co-conspirator exception." He then proceeds to analyze generally whether Austin and Suttle could have met the definition of "conspirator" and concludes that neither could.

At the post-conviction hearing, trial counsel testified that he made numerous hearsay objections at trial which were overruled and that he wanted to maintain some credibility with the jury. The post-conviction court determined counsel was not ineffective in this respect:

> [The petitioner] bases his argument on his characterization of the testimony and the nature of the role these witnesses played in the offense. He presumes neither Austin nor Suttle would not be found to be a true co-conspirator. Further, petitioner's position ignores the strategical decision made by counsel to refrain from excessive objections. An overall examination of the testimony reveals that the Court would not have excluded much of the testimony. Had trial counsel objected, it is likely the Court would not have sustained an objection to all of the evidence. To the extent small portions of the testimony could arguably have been excluded, admission of such minimal testimony does not constitute prejudice sufficient to warrant relief.

The record supports this determination by the post-conviction court.

D. Statements Regarding the Petitioner's Demeanor

The petitioner argues that "Officer Clement was allowed to testify at trial that there was an air of artificiality about [the petitioner's] reaction to the death of his wife and mother-in-law [and] [a]lthough the defense tried to object, the gist of his testimony was allowed." We disagree with the petitioner's view of what occurred at trial. In fact, after trial counsel objected to Officer Clement's testimony about an "undercurrent of artificiality" in the defendant's actions, the court sustained the objection, instructing "describe what you observed, but, not generalize." This claim is without merit.

The petitioner argues that counsel should have objected to Lane Locke's testimony that the petitioner declined to attend his wife's funeral and "never showed remorse or emotion" over her death. He does not suggest what the legal basis might have been for such an objection. Accordingly, there is no merit to this claim.

E. Evidence as to Monetary Motive

The petitioner argues that counsel were ineffective in not objecting to the hearsay statements of Doris Trott that Myrtle Wilson told her the petitioner never repaid any of the money he borrowed

from her and asked her to sign a $10,000 life insurance policy, which she refused to do. Trial counsel did, in fact, object to the testimony, but the petitioner contends that the objection was incomplete or erroneous and that counsel should have requested a limiting instruction. He does not explain the type of limiting instruction that would have been proper and concedes that Trott's testimony may have fallen under the "state of mind" exception to the hearsay rule.

The petitioner argues that trial counsel were ineffective in reacting to the State's claim as to his having monetary motives for the crimes. First, he asserts that the State "argued without objection that one of the [p]etitioner's motives for the killings was to inherit Sandi's 'share'" of an $82,000 certificate of deposit jointly owned by Myrtle Wilson and her son, Larry Wilson. According to the petitioner's argument, "[t]he prosecution knew, and the defense should have known, that any proceeds from the CD going to [the petitioner] was a legal impossibility." The State responds that Tennessee Code Annotated section 31-3-120, which is relied upon by the petitioner as the basis for this legal claim, did not become effective until the year following the homicides. Further, according to the State, the overriding fact as to this matter is that "the petitioner apparently believed that he could inherit the money."

Relating why the petitioner wanted to kill his mother-in-law, Myrtle Wilson, Shawn Austin said the petitioner had told him that, after her death, "then, his wife, Sandi, would get a third. And, . . . if she was passed away, he would be the sole beneficiary being the husband; so, he would get it." Trial counsel testified that he elected to cover this matter in his final argument, which he did, arguing that the petitioner "wasn't gonna get a nickel, not one single nickel from that eighty-three thousand dollars." The petitioner argues that this response was not sufficient and that trial counsel should have "address[ed] this critical issue" with evidence.

While the petitioner argues that trial counsel should have presented "evidence" that he could not inherit from his wife, he did not present such evidence at the hearing. Even if Tennessee law would not have allowed the petitioner to inherit a portion of the proceeds of the CD, this fact would appear to be irrelevant unless counsel additionally could have shown that he was aware of this law. However, as we have set out, the evidence was that the petitioner believed, perhaps incorrectly, that, upon the death of the two victims, he would inherit proceeds of the CD. Accordingly, we conclude that this claim is without merit.

The petitioner argues that Larry Wilson, in his testimony, implied that the petitioner had changed the amount of one of his mother's checks to the petitioner from $40 to $4000. He argues that the joint signatory, Pat Chapman, the daughter of Myrtle Wilson, "did not protest or inquire about the check for more than five months." The petitioner acknowledges, and the record reflects, that trial counsel tried to interview Pat Chapman, but she refused to talk to him. The petitioner argues that trial counsel's "answer is unacceptable" that he did not call Chapman to testify because he did not know what she would say. We note that the petitioner did not present Chapman to testify at the evidentiary hearing. We cannot speculate that her testimony would have been favorable to the petitioner as he assumes would have been the case. See Black, 794 S.W.2d at 757. Additionally, the petitioner has failed to show that a basis for his claim that a witness who refuses to speak with

counsel should be called to testify nonetheless so long as it appears that the witness might testify favorably.

The petitioner argues that trial counsel were ineffective in "failing to be prepared with evidence of the checks made payable to Pat Chapman and others which would have shown that [Myrtle] Wilson was writing checks to distribute" the proceeds of the $10,000 CD. However, as the State points out, the petitioner neither presented proof at the evidentiary hearing as to these checks nor questioned counsel about them.

F. Victim Sandi Stevens' Diary

The petitioner argues counsel were ineffective in that they should have obtained a medical expert to review the victim's diary so that the jury could have learned the victim apparently was writing her entries while under medication. In support of his argument, the petitioner relies upon the testimony of Dr. Kenner at the post-conviction hearing. We note that trial counsel unsuccessfully challenged the admission of the diary on direct appeal. Stevens, 78 S.W.3d 846-48. The petitioner does not allege that he questioned trial counsel at the evidentiary hearing about this claim, that he argued it to the post-conviction court, or that it was ruled on by this court. However, on appeal, he presents the claim that "[h]ad the defense had [Sandi] Stevens' medications evaluated by a medical doctor, her diary could have been seen by the jury in an entirely new light." This is pure speculation as well as a claim which this court is the first to consider. It is waived because it was not presented to the post-conviction court. Brimmer v. State, 29 S.W.3d 497, 530 (Tenn. Crim. App. 1998). Additionally, the petitioner argues that counsel were ineffective for not "request[ing] any kind of limiting instruction regarding [Sandi Stevens'] diary entries that would have limited the use of her diary solely to showing [sic] her state of mind at the time." Apparently, this claim also is made for the first time on appeal, and the petitioner does not suggest any language which would be appropriate for such an instruction or provide any legal authorities which would entitle him to such an instruction. Accordingly, this claim is without merit.

G. Jury Instructions

The petitioner argues that trial counsel were ineffective both in not requesting that the court provide certain instructions and in not objecting to others which were given.

1. Failure to Request Missing Witness Instruction as to Corey Milliken

The petitioner argues that trial counsel were ineffective by not requesting a missing witness charge as to Corey Milliken "who committed the murders [and] did not testify for the State, although he was available to do so." The State responds that there is no reason to assume that Milliken would have favored the State over the defense and, thus, no basis for giving the missing witness instruction. The post-conviction court found the petitioner failed to establish that the instruction should have been given:

The missing witness rule in Tennessee was explained fully in State v. Francis, 669 S.W.2d 85 (Tenn. 1984). The supreme court has held that "a party may comment about an absent witness when the evidence shows that '[1] the witness had knowledge of material facts, [2] that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and [3] that the missing witness was available to the process of the Court for trial." Id. at 88. "The rule is now generally characterized as authorizing a permissive inference." Id. The Francis court added,

> The mere fact that a party fails to produce a particular person who may have some knowledge of the facts involved does not justify application of the inference against him. However, when it can be said with reasonable assurance that it would have been natural for a party to have called the absent witness but for some apprehension about his testimony, an inference may be drawn by the jury that the testimony would have been unfavorable.

Id. at 88-89 (citations omitted).

In the present case, it appears the witness, Corey Milliken, gave inconsistent statements to police regarding the killings and surrounding events. He was similarly inconsistent in his identity of who participated in committing the offenses. Notwithstanding the issue of Milliken's availability or lack thereof, his testimony could arguably have been beneficial or detrimental to either party depending on what testimony came from the witness stand. Trial counsel explained he did not call Milliken due to counsel's fear that Milliken would further implicate the petitioner. The burden of proof is on the party seeking the instruction. See State v. Harold D. Roberts, No. M2001-02291-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 767 (Tenn. Crim. App. filed September 10, 2002 at Nashville) (citing State v. Hodge, 989 S.W.2d 717, 723 (Tenn. Crim. App. 1998)). See also Neil P. Cohen et al., *Tennessee Law of Evidence*, 4.01[14][e] ("[T]he party seeking the instruction must establish a foundation for doing so."). Here, the petitioner has failed to establish that the instruction was appropriate in this case. This claim is without merit.

The record supports this finding by the post-conviction court.

2. Failure to Request Limiting Instruction as to Uncharged Offense of Threats

The petitioner argues that a limiting instruction "was necessary to prevent the jury from using the uncharged threats or intimidation as evidence of the [p]etitioner's bad character from which a general propensity to commit criminal acts can be inferred." The State responds that the petitioner has not specified where in the record is the evidence of his threats or intimidation. We agree. It is

not the responsibility of this court both to identify the evidence which the petitioner believes justifies such a charge and, then, determine what should have been contained in a limiting instruction.

The post-conviction court apparently considered this claim on its merits even though the petitioner had presented no proof regarding it:

> Second, petitioner submits counsel were ineffective for failing to request a limiting instruction regarding the uncharged offense of threats against a witness. Failure to give a limiting instruction is not fundamental or prejudicial error. Therefore, even if counsel failed to request such an instruction, as in this instance, such a failure does not constitute ineffective assistance of counsel. Further, even if it could be construed as a deficient performance, the failure is not a prejudicial error.

The petitioner has pointed to no evidence contrary to this determination.

3. Failure to Request Instruction to View Codefendant's Statements with Caution

The petitioner argues that counsel should have requested "an instruction that the jury should view co-defendant['s] statements and credibility with caution." He has provided no appropriate references to the record, including the questioning of trial counsel about this claim, nor the charge which he feels should have been made. Accordingly, we conclude that this claim has been waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

4. Failure to Request Instruction as to Jailhouse Informer Testimony

The petitioner argues that "[b]ecause of the incentive for a jailhouse informer to falsify testimony in order to curry the favor of the prosecution or in exchange for past or future benefits, it was appropriate to caution the jury regarding the reliability of this testimony." The petitioner has made no references to the record as to this claim, including whether trial counsel were questioned about it, and has not suggested language which he believes would have been appropriate for such a charge.

The post-conviction court found that the claim was without merit:

> [P]etitioner maintains claims [sic] trial counsel erred by failing to request a cautionary instruction with regard to jailhouse informant testimony. He submits that such informants have incentives to falsify testimony in exchange for future benefits by the prosecution. In support of this claim[,] petitioner cites cases concerning the inappropriateness of instructions which diminish or lighten the State's burden of proof. In this instance, informant testimony does not diminish the State's burden of proof; therefore, the cited cases are inapplicable. Further, the jury was instructed how it could determine the credibility of witnesses and the weight, if any, to be given

their testimony. The credibility instruction coupled with the prosecution's obligation to reveal any promises of lenience, etc. foreclose this argument.

The record supports this finding.

5. Failure to Request Instructions as to Lesser-Included Offenses

The petitioner argues that "the failure to request the court to charge lesser-included offenses, e.g., facilitation and solicitation, and the failure to appeal the issue of the trial court's failure to charge the jury on lesser included offenses was ineffective assistance of counsel that prejudiced the [p]etitioner." The petitioner has made no references to the record showing that trial counsel were questioned about this claim or that any other proof was presented regarding it. The post-conviction court found it to be without merit:

> [P]etitioner insists counsel were ineffective for allowing jury instructions that did not permit the jury to find lesser included offenses. Following the proof in this case, the Court inquired into counsel's position regarding lesser included offenses. Trial counsel agreed no lesser included offenses were appropriate in this case. More specifically, the proof was essentially that either petitioner committed first degree murder or that he was not present at all. The Court recognizes its duty to instruct the jury to all lesser included offenses whether requested or not by counsel. However, lesser included offenses are warranted only where, under any view of the facts, the jury could find a charge other than the indicted charge. In this case, the proof necessarily pointed to an "all or nothing" verdict. No proof existed to charge lesser included offenses. Further, because the jury convicted the petitioner of the greater charge, it is clear they believed the petitioner committed the greater offense. Therefore, trial counsel were not [in]effective for failing to request such instructions.
>
> The record supports this determination by the post-conviction court.

6. Failure to Request Instruction as to Failure of the Jury to Agree

The petitioner argues that trial counsel were ineffective "for failing to request an instruction concerning the consequences of failure to agree at [a] penalty and by failing to request an instruction that the jury be informed that guilt phase verdicts will not be affected." The post-conviction court found that this claim was without merit:

> The eleventh claim is that counsel were ineffective for failing to request an instruction concerning the consequences of failing to agree on the appropriate sentence. Specifically, the jury should have been instructed that their indecision on a sentence would not affect the guilt phase finding. No authority exists to support this position. The general principles enumerated in the cases cited by petitioner lend no credence to this claim. The statute has provided for the appropriate procedure

should a jury appear to be deadlocked on the appropriate sentence. Because the jury did not reach an impasse as to the sentence, such an instruction was unnecessary.

The record supports this determination by the post-conviction court.

7. Failure to Object to Instruction as to Unanimous Verdict

The petitioner argues that "[c]ounsel failed to object to the instruction that a unanimous verdict is necessary in order for [p]etitioner to receive a life sentence and/or life without the possibility of parole." As to this, the post-conviction court found:

> [P]etitioner argues counsel failed to object to the instruction that a unanimous verdict is necessary in order for Petitioner to receive a sentence of either life or life without the possibility of parole. The jury was instructed that it must find beyond a reasonable doubt that one or more statutory aggravating circumstances existed. It was further instructed that each individual juror could consider mitigation evidence. There was no instruction requiring the finding of a mitigating factor be unanimous. However, the jury was instructed that their verdict must be unanimous. A majority verdict is not permitted in Tennessee. Therefore, counsel did not err in failing to make such an objection.

The record supports this determination by the post-conviction court.

8. Failure to Object to Instruction as to Absolute Certainty of Guilt

The petitioner argues trial counsel should have objected to the trial court's instruction that absolute certainty of guilt was not required to convict on a criminal charge. The post-conviction court found that this claim was contrary to the law of Tennessee:

> [P]etitioner claims counsel failed to object to the use of the terms "absolute certainty of guilt is not demanded by the law" as applied in both the guilt and sentencing phases and failed to object to the term "moral certainty" used in the same instruction. The Tennessee Supreme Court has repeatedly upheld the "reasonable doubt" instruction. This claim is without merit.

The record supports this determination by the post-conviction court.

9. Failure to Object to Instruction as to Absolute Certainty as to Aggravating Circumstances

The petitioner argues that trial counsel should have objected to the instruction that absolute certainty was not demanded as to proof of aggravating circumstances. He has made no references

to the record showing that any proof was presented on this claim before the post-conviction court or that it was even raised. Accordingly, we conclude that this claim is waived.

10. Failure to Object to Instruction as to Reasonable Doubt

The petitioner argues that trial counsel were ineffective in not objecting to the instruction that "'reasonable doubt' must be found 'to a moral certainty.'" He acknowledges that this claim is contrary to the holdings of our supreme court. See State v. Bush, 942 S.W.2d 489, 520-21 (Tenn. 1997). Accordingly, it is without merit.

11. Failure to Object to Instruction as to Definition of "Intentionally"

The petitioner contends that the effect of the trial court's instruction in this regard as to first degree murder and aggravated robbery "allow[s] a person who consciously engages in a conduct to be found to have consciously caused the result." The post-conviction court found that this claim was without merit:

> [The petitioner] submits counsel failed to object to the definition of the term "intentionally" used in the first degree murder instruction due to the inclusion of the "or" disjunctive. The Court is well aware of the recent challenges to the definitions used in homicide instructions. In State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002), the court extensively analyzed these definitions and the significance of the "or" language. Because the Page decision was filed years after the trial of the instant case, trial counsel was not on notice that such a claim would be viable in Tennessee. Further, their failure to challenge such an instruction was likely in line with the practice of most criminal defense attorneys in Tennessee at that time. Therefore, the Court concludes counsel could not have been defective for failing to object. This claim is without merit.

The record supports this determination by the post-conviction court.

12. Failure to Object as to Victim Impact Instructions

The petitioner argues that trial counsel were ineffective in that they did not object to the instruction that the jury could consider victim impact evidence in determining appropriate punishment and the appropriateness of death. He provides no references to the record that this matter was raised at the evidentiary hearing. Accordingly, it is waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

13. Failure to Object to Instruction on Mitigation Evidence "Favorable" to the Petitioner

The petitioner argues that counsel were ineffective for not objecting to the court's instruction that the jury could consider mitigation evidence which was favorable to the petitioner. He provides

no references to the record that this matter was raised at the evidentiary hearing. Accordingly, it is waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

Sentencing Phase

The petitioner argues that trial counsel failed to select an appropriate psychological expert, failed to direct and monitor the psychologist's work, failed to have her conduct a proper mitigation evaluation, failed to understand and utilize mitigation evidence they had, and were ineffective in presenting the mitigation evidence they had. More specifically, the petitioner alleges that Dr. Leah Welch had little experience in death penalty cases, did not have the records of Catholic Charities, which showed the diagnosis of the petitioner's having ADHD, was unaware of the kind of sexual abuse which had occurred at the Sky Ranch in South Dakota, and did not have Julie Hackenmiller's mitigation and social history of the petitioner. According to the petitioner, it was unreasonable for trial counsel not to present mental health evidence and, in proceeding as they did, trial counsel "gave a false picture" of the petitioner's past.

The post-conviction court found that these claims were without merit:

> [P]etitioner argues counsel failed to do the necessary investigation to develop and pursue a comprehensive mitigation theory for sentencing. He claims significant mitigation evidence was neglected by counsel. Specifically, he maintains counsel failed to complete an adequate social history; failed to competently utilize the social history.
>
> Within this claim, petitioner insists counsel failed to adequately investigate and/or present vital mitigation including (a) childhood sexual abuse; (b) information concerning two biological children of petitioner; (c) information concerning petitioner's child who has ADHD; (d) turbulent childhood in foster care; (e) biological father's prison record; (f) failure of foster parents to adopt petitioner; (g) petitioner's severe adjustment problems while in foster care; (h) trouble tenure at school resulting in ADHD diagnosis; (i) placed on Ritalin at age eleven; (j) history of Ritalin use; (k) juvenile adjustment problems due to organic problems; (l) counseling sessions of petitioner and foster parents concerning ongoing behavioral problems; (m) Petitioner's enlistment and discharge from the Navy; and (n) petitioner's inability to sustain relationships with women.
>
> The testimony of counsel indicated they knew of one of petitioner's biological sons, whose mother testified at the sentencing hearing. Counsel also knew of petitioner's foster family situation and behavioral/disciplinary problems in school. [Co-counsel] specifically testified she knew petitioner had ADHD as a child and that they learned petitioner's biological father had been in prison. [Co-counsel] also testified . . . about knowledge of fainting spells and that the Catholic Charities records were partially redacted. [Trial counsel] recalled that other children were

eventually adopted by the foster family but that petitioner was never adopted by them.

As to any other area not specifically discussed by trial counsel in their respective testimony, petitioner failed to present evidence or submit an argument as to why failing to uncover these other areas constituted a deviation from the level of representation contemplated in Strickland and its progeny. Counsel employed two investigators who expended a large number of hours on this case.

Julie Hackenmiller prepared a social history based on the materials she gathered and interview[s] she conducted. As a mitigation specialist, Hackenmiller was part of the defense team and was made aware of weekly team meetings. Even though Hackenmiller noted a small "to do" list, nothing on the list points to a deficiency in counsel's performance.

Counsel testified that petitioner did not want to put on mitigation evidence in the event he was found guilty of first degree murder. Petitioner maintained that position with [trial counsel]. Notwithstanding petitioner's desires, co-counsel prepared a mitigation strategy should a penalty phase become necessary. Apparently, petitioner did indicate to [co-counsel] that she could do her job at the sentencing phase if he was convicted. She explained that based on the finding of their mental health expert, Leah Welch, she feared the jury might find the diagnosis of antisocial personality disorder was being offered as an excuse. [Co-counsel] believed the best approach would be to show petitioner as a human being by putting on the testimony of various witnesses.

Petitioner cannot in hindsight second guess the tactical decision of trial counsel. Counsel specifically reviewed the mitigation evidence before them and made a strategic call as to what evidence would be best suited to the jury before them. Such decisions are not subject to attack in a post-conviction proceeding.

Even if the Court assumes counsel's performance failed by failing to uncover some piece of evidence for mitigation, the Court does not find the petitioner has established sufficient prejudice to warrant relief. To the contrary, the main theme from [Dr.] Kenner's testimony at the post-conviction hearing was child sexual abuse and the effect it would have had on petitioner. As noted elsewhere in this Order, petitioner had numerous opportunities to divulge any sexual abuse to any number of individuals on the defense team. However, he failed to do so.[3]

[3]In his reply brief, the petitioner seeks to explain why he may not have disclosed, at the time of trial, his sexual abuse by quoting from materials which, apparently, were not utilized at the evidentiary hearing or considered by the post-conviction court in its ruling. They are not in the record and will not be considered by this court.

It became evident at the hearing that the claim of sexual abuse emerged for the first time during a discussion with an investigator with the post-conviction defender's office. The investigator purportedly discussed with petitioner a number of allegations of sexual abuse at Sky Ranch which had been reported on the Internet. After this confrontation, petitioner suddenly felt compelled to share his history of sexual abuse. Petitioner had specifically denied any such abuse in his pre-trial interview with Dr. Schac[h]t, the State's mental health expert.

No proof was offered to verify or dispel the testimony regarding sexual abuse. Dr. Kenner attempted to provide some support for the claim by opining that many of petitioner's life responses were consistent with someone who had been sexually abused.

Due to this conflicting evidence regarding claims of sexual abuse, the Court has insufficient evidence before it to reasonably conclude that such abuse occurred. Further, if such abuse did or did not occur, petitioner's decision to keep such information secret until he had been sitting on death row makes its emergence more problematic.

Petitioner had the opportunity to inform counsel and others at the trial level of such abuse. That counsel did not uncover this claim of sexual abuse did not constitute a deviation from the level of representation required of criminal defense attorneys.

The burden is on petitioner to prove the allegations made in the post-conviction petition. Here, he failed to meet the burden on this issue.

. . . .

In his argument, petitioner acknowledges counsel retained the services of a psychologist, Leah Welch. However, he discounts her findings and diagnosis due to her lack of experience and what he characterizes as an inadequate social history. Petitioner adds that Welch also failed to adequately consult with counsel.

Leah Welch was not called as a witness at the hearing; therefore, many of the claims against her cannot be assessed by the Court. Counsel testified that Welch had worked on capital cases in Arkansas. [Co-counsel] spoke of her contact with Welch in preparation for the trial. Welch concluded that petitioner suffered from antisocial personality disorder. Apparently, this finding was also supported by the state's expert, Dr. Schac[h]t. Petitioner's claim is unsupported by any credible evidence, and therefore, is without merit.

Similarly, petitioner concedes a mitigation specialist was obtained in the present case but that due to lack of coordination, guidance and communication from the trial counsel, the specialist failed to develop a mitigation theory on her own. First, the Court notes that co-counsel testified she had regular team meetings made know[n] to mitigation specialist, Julie Hackenmiller. For some reason, Hackenmiller chose not to attend some of the meetings. However, the testimony indicated Hackenmiller and [co-counsel] maintained regular phone contact during the period.

Hackenmiller testified at the hearing that she conducted a full social history of the petitioner. While she noted some unfinished areas, most of the materials sought by her were eventually obtained. Hackenmiller did acknowledge her failure to obtain the un-redacted version of the Catholic Charities records. She did not uncover any allegation of sexual abuse. The self-serving statements and opinions of Hackenmiller as to counsel's performance are unpersuasive. For example, she opined that counsel had no plan for mitigation. However, she acknowledged (and as was presented at the hearing), counsel discussed the mitigation phase with petitioner. Petitioner maintained a somewhat staunch position that he would not present mitigation evidence if convicted. [Trial counsel] testified that petitioner informed him he would take the death penalty if convicted.

Despite petitioner's insistence, counsel continued to pursue mitigation theories and evidence. Hackenmiller even acknowledged that petitioner eventually agreed to allow [co-counsel] to "do her job" and present mitigation evidence. [Co-counsel] also testified that she made the tactical decision not to present the findings of Leah Welch at the hearing. She felt the jury might see the disorder testimony as an excuse and would harm their case. Counsel made the conscious decision to present lay witness testimony to humanize the petitioner.

Hackenmiller's testimony as to a chaotic or uncooperative environment or lack of a mitigation theory is baseless and again self-serving. She testified her work in preparing a social history was thorough and that she tried to get every document relating to a defendant's past. Her attempt to negate her own standard for the purpose of a post-conviction hearing is incredulous [sic]. This claim is without merit.

. . . .

Petitioner argues counsel were ineffective for relinquishing the opportunity to put on any mental health evidence. Counsel testified that they retained Leah Welch, a psychologist from Arkansas[,] to evaluate the petitioner. Welch concluded petitioner suffered from antisocial personality disorder.

> [Trial counsel] stated petitioner did not want to present mitigation evidence at all if found guilty. [Co-counsel] said she spoke with Leah Welch on various occasions and discussed the diagnosis with Welch. [Co-counsel] concluded the diagnosis of antisocial personality disorder might be seen by the jury as an excuse and hurt the case. Counsel made the tactical decision not to present the evidence.
>
> This tactical decision was based in reason and illustrated counsel's attention to the issue of petitioner's mental health. Petitioner's claim that in hindsight perhaps another avenue would have been more appropriate does not establish a deficient performance by counsel. This claim is without merit.

The record supports the determination by the post-conviction court that the petitioner failed to establish that trial counsel were ineffective in the sentencing phase of the trial.

III. Prosecutorial Misconduct

The State's concluding argument in the guilt/innocence phase consists of twenty-four pages in the trial transcript, from which the petitioner has pointed to several statements which, in his view, were improper and entitle him to relief. We note that his trial attorneys did not object to any of these statements or raise this issue on appeal. Therefore, the claims are waived. See Tenn. Code Ann. § 40-30-106(g). This inaction, argues the petitioner, amounts to ineffective assistance of counsel. Accordingly, we will consider the claims on that basis.

A. "Cold Blooded Killer" Argument

First, the petitioner objects to the State's arguing that he was "a cold blooded killer." The post-conviction court found that this claim was without merit:

> [P]etitioner challenges the prosecutor's statements made during closing argument at the guilt/innocence phase. The first claim is that counsel should have objected to the prosecutor's reference to the petitioner as a "cold blooded killer." Viewing the evidence in the light most favorable to the State at the closing argument, the jury had heard testimony that the petitioner hired Corey Milliken to kill his wife and mother-in-law. The State's position was that the petitioner acted intentionally and desired to have these individuals killed in their own home. The jury heard, among other reasons, the petitioner wanted them killed so that he could take the home, the money, etc. While the term "cold blooded killer" may have been offensive to the petitioner, its use here, though not condoned, did not so affect the jury that petitioner is entitled to relief. Such a term falls short of the terms cited by petitioner in other cases. This claim is without merit.

The record supports this determination.

Additionally, the petitioner argues that the State's use of the phrase "cold-blooded killer" "impermissibly introduced a non-statutory aggravating factor." However, he provides no argument or authority for his claim that an aggravating factor can result from the State's use in closing argument of a short, descriptive phrase, especially, as here, where the court concluded that its use did not affect the jury to such an extent that relief was warranted. This claim is waived. See Tenn. R. App. P. 27(a).

B. "Embezzlement" Argument

The petitioner argues that the State "made an improper closing argument at the guilt/innocence phase of the trial that [the petitioner] was 'embezzling money from Myrtle Wilson.'" The post-conviction court determined that trial counsel were not ineffective for not raising this matter at trial or as an issue on appeal:

> [The petitioner] argues counsel should have objected to the prosecutor's reference to petitioner as "embezzling money from Myrtle Wilson." At the core of his claim is his technical reading of the definition of embezzlement which includes the reference to a fiduciary capacity. He argues that because the State failed to prove petitioner was a fiduciary to Mrs. Wilson, the reference was an incorrect statement of the law. Therefore, he claims counsel should have objected to the term as improper evidence of another crime and an inappropriate non-statutory aggravating circumstance. The testimony at trial created the inference, if believed by a jury, that petitioner had taken money from Mrs. Wilson without her knowledge. Viewing the record as a whole, arguably a different term should have been used to support the State's position that the jury should believe petitioner took money from Ms. Wilson, his mother-in-law. However, the use of the term did not urge the jury to convict petitioner or highlight evidence of an uncharged crime. Further, the term did not constitute a non-statutory aggravating circumstance at the penalty phase. These claims are without merit.

The record supports this finding by the post-conviction court.

C. "No Sympathy" Argument

The petitioner argues that the State made improper closing arguments in saying that the jury "could not decide the case on sympathy," that the petitioner was "attempting to kill again," and that "you can right the wrong that was done by this man right here." The post-conviction court determined that these claims were without merit:

> [T]he petitioner argues counsel were ineffective for failing to object to the prosecutor's argument at the guilt/innocence phase that the jury should not decide the case on sympathy, that petitioner was attempting to kill again, and that "you can right the wrong done by this man right here, this cold blooded killer." First, the

> prosecutor's reference to sympathy is appropriately in line with the Court's instruction that the jury must not allow sympathy, prejudice, etc. to include [sic] their verdict. This instruction has been upheld by our supreme court and the United States Supreme Court. See State v. Porterfield, 746 S.W.2d 441 (Tenn. 1998) (citing California v. Brown, 479 U.S. 538 (1987)). Therefore, failure to object did not constitute ineffective counsel. Next, the State's reference to "killing again" comported with the testimony at trial. It was not inappropriate to refer to the evidence and assert their position. Finally, the reference to cold blooded killer was addressed above. Counsel were not ineffective for failing to object.
>
> The record supports this finding.

D. Other Arguments

The petitioner argues that the State made certain arguments at the conclusion of the trial to the effect that the petitioner had no remorse and had committed uncharged crimes and that the State's closing argument improperly vouched for the credibility of certain witnesses. We note that the petitioner makes no references to his questioning trial counsel or any other witnesses about these statements. As to the petitioner's spending the night at his trailer where the two homicides occurred, the State said, during final argument, that the petitioner was not "too distraught" to do this and that he "showed no emotion about his wife's death, no remorse." Further, the petitioner argues, as we understand, that the State impermissibly spoke during closing arguments of uncharged crimes by asserting that the petitioner's "first motive was to kill his ex-wife" and that after his arrest, he "continued to manipulate his friends, inmates attempting to kill again."

Additionally, the petitioner argues that the State improperly vouched for certain witnesses, asserting that the State did not "think they lie[d] about something like that," that the State submitted a witness was telling the truth, and that it was not reasonable for two other witnesses to lie.

The post-conviction court determined that the petitioner's claims were without merit:

> Finally, petitioner claims counsel failed to object to improper closing statements relating to petitioner's post-arrest demeanor; alleged but uncharged crimes; improper vouching for the credibility of certain witnesses and the prosecutor's own opinions about the evidence. Upon review of each of these excerpts, this Court cannot find that any of the portions were improper or reflected improper conduct on the part of the State. However, the Court notes the State must refrain from vouching for the credibility of witnesses. In this instance, such a reference did not rise to the level of misconduct. The other portions cited reflect argument based on the State's view of the evidence. The Court would have overruled any such objection.
>
> The record supports this finding.

IV. Jury Sequestration

Without argument or reference to the record, the petitioner broadly asserts that his federal and state constitutional rights were violated when the trial court denied his request to sequester the potential jurors. The post-conviction court found that this claim was without merit:

> In the present case, the Court conducted individual voir dire with participation by counsel. A number of jurors were preliminarily qualified by determining whether they could follow the law regarding capital sentencing. Those who indicated they could follow the law and make a determination based on the law were called back for final jury selection. The Court did not sequester the potential jurors during this process. The jurors were sworn prior to the start of oral arguments and ensuing proof.
>
> Petitioner now claims this failure was error warranting post-conviction relief. He also claims appellate counsel were ineffective for failing to raise this claim. This Court disagrees.
>
> First, the potential jurors were repeatedly admonished throughout these preliminary phases. They were instructed not to read, listen to or watch any news account about the case. Further, they w[ere] warned not to discuss the matter with anyone. Petitioner has failed to explain why the jurors should have been sequestered during the selection process. Absent some evidence of a violation of the Court's admonitions during this process, no basis exists to support this claim.
>
> Even if such a procedure was warranted by the law, petitioner has similarly failed to establish how he was prejudiced by the failure to sequester the potential jurors. No evidence exists that the jury was tainted or exposed to extraneous evidence during the selection process. The sequestration of the jurors after being sworn adequately maintained the integrity of the jury and assured a fair and impartial trial. This issue is without merit either in the context of a general constitutional challenge or in a claim of ineffective appellate counsel.

This argument is waived because the petitioner has not included in his brief appropriate references to the record or legal authorities. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Additionally, it is waived because the petitioner presented no proof at the post-conviction hearing as to why jury sequestration was needed.

V. Sufficiency of the Evidence

Without reviewing the evidence which he believes is relevant to this claim, the petitioner argues that his rights under the state and federal constitutions were violated because "without the

inadmissible hearsay, the evidence is insufficient to support a finding that [the petitioner] committed premeditated, intentional, malicious murder." However, as we previously have set out, we disagree with the petitioner's claim that certain of the evidence was "inadmissible hearsay." Further, on direct appeal, it was determined that the evidence was sufficient to support the convictions and sentences. Stevens, 78 S.W.3d at 841. This claim is without merit.

VI. Claims as to Imposition of the Death Penalty

A. Effect of Offering of Plea Bargain to the Petitioner

The petitioner argues that because, prior to trial, the State had offered a plea bargain of the sentence of life without the possibility of parole, his rights under the state and federal constitutions were violated by imposition of the death penalty. He cites no authorities for his proposition that, in a capital case, by offering to let the defendant plead guilty to other than a sentence of death, the State then is barred from seeking the death penalty if the plea offer is rejected. Accordingly, this claim is waived.

B. Death Penalty is Disproportionate to the Crimes

The petitioner raises this claim but acknowledges that it was resolved against him by our supreme court on direct appeal. Stevens, 78 S.W.3d at 841. This court is without authority to reverse a decision of the Tennessee Supreme Court.

C. Death Penalty Violates the Petitioner's Constitutional Rights

The petitioner argues that the holdings in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999), require that the aggravating circumstances be pled in the indictment. However, in State v. Berry, 141 S.W.3d 549, 558-62 (Tenn. 2004), our supreme court concluded that such claims are without merit. Additionally, he argues that various of his constitutional rights were violated because the aggravating factors making him eligible for the death penalty were not in the indictment and returned by the grand jury. The State responds that in Berry, 141 S.W.3d at 558-62, our supreme court held that compliance with Tennessee Rule of Criminal Procedure 12.3, which requires the notice of the State's intention to seek the death penalty and the aggravating circumstances upon which the State will rely must be given thirty days prior to the trial, provides the constitutionally required notice. This claim is without merit.

D. Death Penalty Violates the Petitioner's Right to Life

The petitioner asserts that the death sentence is unconstitutional in that it infringes upon his fundamental right to life and that the punishment of death is not necessary to promote any compelling state interest. This claim is contrary to settled law. See Cauthern v. State, 145 S.W.3d

571, 629 (Tenn. Crim. App. 2004) (citing Nichols v. State, 90 S.W.3d 576, 604 (Tenn. 2002); State v. Mann, 959 S.W.2d 503, 536 (Tenn. 1997) (appendix); Bush, 942 S.W.2d at 523).

E. Execution by Lethal Injection Violates the Petitioner's Constitutional Rights

The petitioner argues that executing him by lethal injection would violate his constitutional rights but recognizes that this claim is foreclosed by the holding of our supreme court in Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005), cert. denied, __ U.S. __, 126 S. Ct. 2288 (2006). We agree. This claim is without merit.

F. Death Sentence Violates International Law

The petitioner argues that his convictions and death sentences violate his rights under international law, including "his rights under treaties ratified by the United States, his rights under treaties entered into and signed by the President of the United States and his rights under customary international law."

Arguments that the death penalty is unconstitutional under international laws and treaties have systematically been rejected by the courts. See State v. Odom, 137 S.W.3d 572, 600 (Tenn. 2004). This claim is without merit.

G. Accumulated Errors Require Reversal

1. Aggravating Circumstances

The petitioner argues as to various constitutional infirmities of the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-2-204(i)(2), (i)(5), (i)(6), and (i)(7), including that our statutes do not "meaningfully narrow the class of death eligible defendants." However, factors (i)(5), (6), and (7) were not charged by the court as aggravating factors, and the petitioner has not attempted to explain why he is objecting as to aggravating circumstances which appear to be irrelevant to his case. This portion of his claim is without merit. See State v. Hall, 958 S.W.2d 679, 715 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994). His argument with regard to factor (i)(2) has previously been rejected by our supreme court in State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984), and State v. Blouvett, 904 S.W.2d 111 (Tenn. 1995). Applying the holdings of our supreme court in Caldwell and Blouvett, we conclude that this assignment is without merit.

2. Death Penalty Imposed Capriciously and Arbitrarily

The petitioner argues that the death sentence was imposed capriciously and arbitrarily because (1) unlimited discretion is vested in the prosecutor as to whether to seek the death penalty; (2) the death penalty is imposed in a discriminatory manner based upon race, geography, and gender; (3) he was not allowed individual voir dire of prospective jurors; (4) the death qualification process

for jury selection makes the jury more likely to convict; (5) the defendant may not address misconceptions about sentencing; (6) the jury is required to unanimously agree to a life verdict in violation of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990), and Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988); (7) the failure to instruct the jury on the meaning and function of mitigating circumstances results in the reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances; (8) the jury is not required to make the ultimate determination that death is the appropriate penalty; (9) the defendant is denied final closing argument in the penalty phase; (10) damaged, depressed, and mentally ill defendants are allowed to waive presentation of mitigation evidence; and (11) mandatory introduction of victim impact evidence and other crime evidence violates separation of powers and the defendant's right to due process and equal protection of the laws. Our supreme court has rejected each of these arguments. See State v. Thomas, 158 S.W.3d 361, 406-408 (Tenn. 2005); Odom, 137 S.W.3d at 601-03; Hines, 919 S.W.2d at 582; Brimmer, 876 S.W.2d at 87; State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993); State v. Thompson, 768 S.W.2d 239, 250-52 (Tenn. 1989).

H. Death Penalty Appellate Review Process is Constitutionally Inadequate

The petitioner argues that the appellate review process for death penalty cases is constitutionally inadequate because it is not "meaningful" in that the appellate court cannot reweigh proof; the information used for comparative review is inadequate and flawed; flawed methodology is employed in comparative review; and the proportionality review violates the law. Our supreme court has rejected these arguments. See State v. Young, 196 S.W.3d 85, 131 (Tenn. 2006) (appendix) (citing State v. Vann, 976 S.W.2d 93, 118-19 (Tenn. 1998); Cazes, 875 S.W.2d at 270-71). Additionally, our supreme court has determined that, "[w]hile important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997) (footnote omitted).

This claim is without merit.

VII. Compensation for Dr. Kenner

The petitioner argues that the "post-conviction trial court deprived [Dr. Kenner] of his rights to due process by failing to compensate [him] for the total amount of work he performed in this case." He asserts he has standing to raise this claim because "he and other capital post-conviction petitioners are adversely [a]ffected if failure to pay experts retained by post-conviction counsel, and compensated through the Administrative Office of the Courts, are denied compensation."

Relying on the holding of our supreme court in Short v. Ferrell, 976 S.W.2d 92 (Tenn. 1998), the State responds that the petitioner should have sought review of the fee dispute by filing a common law writ of certiorari and that this claim cannot be raised in the appeal of a petition for post-conviction relief. In that case, a common law writ of certiorari was filed by a petitioner seeking post-conviction relief who believed that an expert witness had not been properly compensated. Our

supreme court explained in Short that fee claims must be pursued through the procedure established by Tennessee Supreme Court Rule 13. Although the petitioner in this matter argues that both his and Dr. Kenner's rights to due process were violated by the post-conviction court's denial of additional compensation, he does not explain why he did not pursue this claim through the avenue provided by Rule 13. Accordingly, we agree with the State that this claim is without merit.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court.

_____

ALAN E. GLENN, JUDGE